88-1255

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS; NATURAL RESOURCES DEFENSE COUNCIL, INC.; *et al.*,
Petitioners,

v.

JAMES M. LOVE, *et al.*,

DAVID FROHNMAYER, Attorney General for the State of Oregon,

and

JOHN A. MOORE, Acting Administrator, United States Environmental Protection Agency
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Does Section 6(c) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136d(c)(2), create jurisdiction in the district courts to enjoin an emergency suspension of a pesticide by the Environmental Protection Agency after available administrative proceedings to consider the propriety of the suspension were waived? *

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* The defendant-appellant in the court of appeals (and a nominal respondent in this Court) was Lee M. Thomas, Administrator, United States Environmental Protection Agency. Mr. Thomas has now been replaced as Administrator by Acting Administrator John A. Moore. Defendants-intervenors in the court of appeals, (now petitioners in this Court) were American Federation of Labor and Congress of Industrial Organizations; Natural Resources Defense Council, Inc.; United Farmworkers of Washington States; Pineros Y Campesinos Unidos Del Noroeste, Inc.; Christina Esquivel; Diana Guzman; Alicia Prieto; Aurora Leon; Zenaida Prieto; Maria Esquivel; Constancio Martinez; Juan Prietom Jr.; Enrique Prieto; and Antonio Leon. Plaintiffs-appellees in the court of appeals (and respondents in this Court) were James M. Love; Northwest Food Processors Association; and Tualatin Valley Fruit Marketing, Inc. Plaintiff/intervenor-appellee in the court of appeals (and now respondent) was Dave Frohnmayer, Attorney General for the State of Oregon, on behalf of the people of the State of Oregon.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), the Natural Resources Defense Council, Inc. ("NRDC"), *et al.*, defendant-intervenors in this case, petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment in *Love v. Thomas*, 838 F.2d 1059 (9th Cir. 1988).

OPINIONS BELOW

The District Court opinion in this case is reported at 668 F.Supp. 1443 and is reprinted at pp. 47a to 65a of the separately bound Appendix to this *certiorari* petition ("App. 47a-65a"). The Ninth Circuit opinion and judgment is reported at 838 F.2d 1059 and is reprinted at App. 1a-41a. The order amending the opinion and denying petitioner's and respondent Moore's petition for Rehearing and Suggestions for Rehearing *En Banc* is unreported, and is reprinted at App. 42a-44a.

JURISDICTION

The amended opinion and judgment of the United States Court of Appeals for the Ninth Circuit were issued on September 28, 1988. On the same day, the petition for rehearing and suggestion for rehearing *en banc* of the respondent Environmental Protection Agency ("EPA") Administrator[1] and petitioners' suggestion for rehearing *en banc* were denied. On December 21, 1988 Justice O'Connor signed an order extending the time for filing a petition of certiorari to and including January 26, 1989. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 6(c) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), as amended, 7 U.S.C. § 136d(c), provides:

> (1) *Order* If the Administrator determines that action is necessary to prevent an imminent hazard during the time required for cancellation or change in classification proceedings, he may, by order, suspend the registration of the pesticide immediately. No order of suspension may be issued unless the

[1] From the time this case was filed until it was finally decided by the Ninth Circuit, the EPA Administrator was Lee Thomas. At present, there is an acting EPA Administrator, John A. Moore.

Administrator has issued or at the same time issues notice of his intention to cancel the registration or change the classification of the pesticide.

Except as provided in paragraph (3), the Administrator shall notify the registrant prior to issuing any suspension order. Such notice shall include findings pertaining to the question of "imminent hazard". The registrant shall then have an opportunity in accordance with the provisions of paragraph (2), for an expedited hearing before the Agency on the question of whether an imminent hazard exists.

(2) *Expedited hearing* If no request for a hearing is submitted to the Agency within five days of the registrant's receipt of the notification provided for by paragraph (1), the suspension order may be issued and shall take effect and shall not be reviewable by a court. If a hearing is requested, it shall commence within five days of the receipt of the request for such hearing unless the registrant and the Agency agree that it shall commence at a later time. The hearing shall be held in accordance with the provisions of subchapter II of chapter 5 of Title 5, except that the presiding officer need not be a certified administrative law judge. The presiding officer shall have ten days from the conclusion of the presentation of evidence to submit recommended findings and conclusions of the Administrator, who shall then have seven days to render a final order on the issue of suspension.

(3) *Emergency order* Whenever the Administrator determines that an emergency exists that does not permit him to hold a hearing before suspending, he may issue a suspension order in advance of notification to the registrant. In that case, paragraph (2) shall apply except that (i) the order of suspension shall be in effect pending the expeditious completion of the remedies provided by that paragraph and the issuance of a final order on suspension, and (ii) no party other than the registrant and the Agency shall participate except that any person ad-

versely affected may file briefs within the time allotted by the Agency's rules. Any person so filing briefs shall be considered a party to such proceeding for the purposes of section 136n(b) of this title.

(4) *Judicial review* A final order on the question of suspension following a hearing shall be reviewable in accordance with section 136n of this title, notwithstanding the fact that any related cancellation proceedings have not been completed. Any order of suspension entered prior to a hearing before the Administrator shall be subject to immediate review in an action by the registrant or other interested person with the concurrence of the registrant in an appropriate district court, solely to determine whether the order of suspension was arbitrary, capricious or an abuse of discretion, or whether the order was issued in accordance with the procedures established by law. The effect of any order of the court will be only to stay the effectiveness of the suspension order, pending the Administrator's final decision with respect to cancellation or change in classification. This action may be maintained simultaneously with any administrative review proceeding under this section. The commencement of proceedings under this paragraph shall not operate as a stay of order, unless ordered by the court.

STATEMENT OF THE CASE

I. THE FACTS

EPA became concerned about the health risks posed by the pesticide dinoseb in the spring of 1986, following submission to the agency of new scientific studies concerning the safety of the chemical. *See* Decision and Emergency Order Suspending the Registrations of all Pesticide Products Containing Dinoseb, 51 F.Reg. 36,634, 36,635 (EPA Oct. 14, 1986) (hereafter "Emergency Order"); *see also* Notice of Intent to Cancel and Deny all Registrations for Pesticides Products Containing Dinoseb, 51 Fed. Reg. 36650, 36657-8 (EPA Oct. 14,

1986) hereafter "Notice of Intent to Cancel"). On October 7, 1986, EPA issued an emergency order requiring an imediate cessation of the use, transfer, and sales of the product, pending full consideration in administrative proceedings concerning whether, given dinoseb's risks and benefits, the registration of all pesticides containing dinoseb should be permanently cancelled.

The emergency suspension order was based upon detailed administrative findings, relying upon several scientific studies, recited in 16 densely packed pages of the Federal Register. The EPA Administrator's conclusion was that dinoseb presents "an imminent hazard" to human health so serious as to constitute a public health "emergency." In particular, the Administrator found that continued use of dinoseb even for a limited period posed grave risks of adverse reproductive effects for both males and females exposed to the products.[2]

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[2] More specifically, in his October 7, 1986 Emergency Order, the Administrator concluded that dinoseb is (1) a developmental toxin resulting in brain and spinal deformities in the fetus; (2) a reproductive toxin resulting in wasting or degeneration of the testes, decreased sperm counts and production of abnormal sperm cells in males and decreased fetal viability in their mates, including spontaneous abortions, miscarriages and stillbirths; (3) a male sterilent; (4) a potential human carcinogen; (5) a cause of blindness through cataracts and adverse affects on the immune system. *See* Emergency Order, 51 Fed. Reg. at 36636-38. The Administrator also concluded that "women of childbearing age who handle dinoseb and who wear the required state of the art protective farm equipment will still receive sufficient exposure to have no effective protection against potential dinoseb-induced birth defects" and that "no adequate means exist to warn or prohibit pregnant females from being in the proximity of farms that use dinoseb." *Id.* at 36643 and 36648. Finally the suspension order concluded that "virtually all workers directly involved in the application of dinoseb products have an inadequate margin-of-safety" and "spray drift, reentry and secondary exposure to residues on equipment or clothing may pose a substantial risk of inducing birth defects." *Id.* at 36635, 36643.

Following issuance of this emergency order, the Administrator determined, based upon additional data submitted by one registrant,

Only four of the more than three hundred dinoseb manufacturers and other registrants contested the suspension order by requesting a hearing on that order pursuant to § 6(c)(2) of FIFRA; all four then jointly withdrew their request ten days later. The statute provides that ordinarily, if no request for a hearing is submitted within five days of notice of a suspension order, "the suspension . . . shall not be reviewable by a court." FIFRA § 6(c)(2), 7 U.S.C. § 136(c)(2).

II. THE PROCEEDINGS IN THE DISTRICT COURT

Nonethelesss, the following year, on April 3, 1987, certain non-registrant users of dinoseb in Washington, Oregon, and Idaho went into district court seeking relief from the EPA's suspension order with regard to a few crops. App. 7a.[3] Twelve days later, the district court asserted jurisdiction on the basis of § 6(c)(4) of FIFRA, allowing "immediate review" of a suspension order issued "prior to a hearing before the Administrator." Following a two day trial *de novo* on the Administrator's determination that dinoseb presents an imminent hazard to human health, that court issued a preliminary injunction against the enforcement of the agency's emergency order pending completion of the EPA's cancellation proceeding.

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that the risks posed by dinoseb are actually considerably *more* severe than initially believed. *See* Respondent Administrator's Motion for Expedited Review or Partial Stay Pending Appeal in 9th Circuit, Appendix E. Specifically, the Director of the EPA Office of Pesticide Programs described the post-suspension studies this way: "The startling results in this new study indicate that the low or non-existent margins-of-safety of persons applying dinoseb previously calculated by the agency were overestimated by a factor of at least three. . .". ["U]se of dinoseb would produce a serious and unacceptable hazard to human health." *Id.* at 4.

[3] As non-registrants, these users of dinoseb had no right to request an administrative hearing on the propriety of the suspension. FIFRA § 6(c)(1), 7 U.S.C. § 136(c)(1).

The district court "did not question the scientific merit of EPA's decision" and held that "[a]ll the evidence substantiating the risks of use of dinoseb appeared to be well-founded." App. 58a. That court, rather, faulted EPA for the manner in which the agency determined the likely economic impact of the suspension of dinoseb on the growers of the crops involved in this case. App. 59a.

Having characterized EPA's emergency order as "arbitrary," the district court issued an injunction permitting the use of dinoseb if twelve prescribed conditions were followed. App. 69a-71a.[4] These included, *inter alia*, a requirement that "women of childbearing age, i.e., under the age of 45, may not be involved in mixing, loading, or any aspect of dinoseb application." App. 70a. On May 1, 1987, without any further hearing, the district court entered a final judgment and issued a permanent injunction. App. 47a.

III. THE PROCEEDINGS IN THE COURT OF APPEALS

On May 29, 1987, the present petitioners filed a motion to intervene in this proceeding, intending both to support EPA's position on the case and to challenge the portion of the district court's injunction excluding women from employment where the pesticide was used.[5] The Ninth Circuit granted the motion to intervene, and granted as well EPA's motion to expedite consideration of the case.

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[4] Under a separate petition for reconsideration of the suspension order filed by growers in Idaho and Washington, the Administrator had previously modified his suspension of dinoseb to allow its use on three crops under limited circumstances. The district judge incorporated many of these conditions in his injunction.

[5] Petitioners contended that such an exclusion, when imposed by a governmental entity, violates both the Constitution and FIFRA; where use of pesticide is harmful to the reproductive health of women, the appropriate response, petitioners maintained, is to ban the pesticide, not the women workers.

After argument, a divided court upheld both the district court's assertion of jurisdiction and the conclusion that EPA's emergency suspension was arbitrary.[6] In finding jurisdiction, Judge Kozinski, writing for the majority, held that while judicial review of an ordinary suspension order would have been foreclosed once the statutory administrative hearing had been waived, the district court nonetheless had jurisdiction to review the agency's initial emergency order under the "immediate review" provision of FIFRA § 6(c)(4) many months after the opportunity for an administrative hearing on the underlying suspension of the pesticide had come and gone. App. 15a.

In dissent, Judge Norris characterized the majority opinion as sanctioning "a remarkably tortured and hypertechnical reading of the statute." App. 38a. Judge Norris went on:

> [T]he majority suggests no reason why Congress would make a distinction between the judicial reviewability of ordinary and emergency suspension orders. I suggest none exist. . . . It simply defies common sense that an ordinary suspension order becomes final and unreviewable in the absence of a timely request for a hearing but an emergency order remains open and reviewable indefinitely. . . . Judicial review of an emergency suspension order is

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[6] This petition raises only the jurisdictional question decided below. The reason is not that we concur with the court of appeals' conclusion that the Agency acted arbitrarily, which we decidedly do not, but that, as limited by its amended opinion (App. 43a-44a), the merits decision is largely fact-specific, and therefore does not call for this Court's exercise of its certiorari authority. The jurisdiction issue, on the other hand, raises a generic question likely to have a serious impact upon EPA in dealing with later pesticide emergencies and therefore *does* merit this Court's immediate attention.

> thus available under section 6(c)(4) only in the period of time after an expedited hearing has been requested but before the Administrator renders a final order on the issue of suspension, normally a matter of a few weeks. . . . [App. 39a].

Judge Norris concluded:

> The bottom line in this case shows the majority's reading of the statute is bizarre. Contrary to the clear intent of Congress, which has written a statute which speaks in terms of suspension order becoming final in *five days* if no registrant requests expedited hearing, the majority allows non-registrants to seek judicial review of an emergency suspension order *seven months* after it becomes final by the terms of this statute. The district court clearly lacked jurisdiction to review the emergency suspension order. [App. 41a] [7]

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[7] At the time the Ninth Circuit opinion issued, only two dinoseb registrants, the Cedar Chemical Company and Drexel Chemical Company, were still contesting the final cancellation of the product before the agency. Those two companies, then entered into a settlement agreement with the Administrator providing for the final cancellation of their registration. The Agency agreed that existing stocks of certain dinoseb products could be sold and distributed for use for the 1988 and 1989 growing seasons. The Administrative Law Judge hearing the dinoseb cancellation approved the settlement and, on June 10, 1988, the Administrator issued a final decision and order in the dinoseb cancellation proceeding. *See, In the Matter of Cedar Chemical Company, et al., v. U.S. Environmental Protection Agency*, FIFRA Docket Nos. 590, *et al.*, Cancellation Order and EPA Rationale for Settlement.

Three days later, on June 13, 1988, the Administrator filed in the Ninth Circuit a motion to vacate the judgments in this case, on the grounds of mootness. This motion was predicated on the supposition that the final cancellation order superceded the Administrator's suspension at issue here. Subsequent to the Administrator's motion, however, the same district court that ruled in this case again interceded: New actions were filed by some of the plaintiffs in the present case and others, challenging the settlement reached with the remaining dinoseb registrants. *See Northwest Food Processors Association, et al. v. Thomas*, Civ. No. 88-641-RE

REASONS FOR GRANTING THE WRIT

This litigation concerns the power of the EPA Administrator to act swiftly and effectively when the Agency determines that continued use of a particular pesticide would create an "imminent hazard" to public health so extreme as to constitute an "emergency." In

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(D. Ore.) On June 17, 1988, the district court granted a preliminary injunction staying the Administrator's cancellation decision, notwithstanding the fact that all registrants had now acquiesced in dinoseb's cancellation.

On August 1, 1988, the Ninth Circuit issued an order requiring all parties to address the issue of whether "the District Court's order of June 17, 1988, staying the Administrator's cancellation order of June 9, 1988, has rendered the order a nullity for purposes of mootness." Intervenors AFL-CIO, NRDC et al. as well as Appellees Northwest Food Processors Association, et al., submitted memoranda urging that the case was not moot. Likewise, on August 5, 1988, the Administrator requested that its motion regarding mootness be "held in abeyance pending final action concerning the dinoseb cancellation in *Northwest Food Processors v. Thomas*, Civ. No. 88-641-RE. (D. Oregon)." Appellant's Reply to Response to Motion to Vacate the Judgments, Dismiss the Complaint and Issue the Mandate Forthwith on the Grounds of Mootness at 7. On September 19, 1988, the Ninth Circuit denied the Administrator's motion to vacate on the grounds of mootness. App. 45a.

The long and tortured progress of this litigation over dinoseb then continued. On October 4, 1988, the district court held that it was without jurisdiction to review the Administrator's final cancellation order since such review power was instead vested in the court of appeals. *Northwest Food Processors, et al. v. Thomas, supra,* (Order Granting Summary Judgment). The Northwest Food Processors Association, et al., then filed a Notice of Appeal (9th Cir. No. 88-4339), and some of the petitioners herein, having been granted intervention to challenge the provision of the Administrator's cancellation order allowing dinoseb's existing stocks to be utilized, filed a timely cross appeal. (*Alvarez et al. v. Thomas,* 9th Cir. No. 88-4389). The Northwest Food Processors Association has also filed an original proceeding in the Ninth Circuit to challenge the Administrator's final cancellation order. *Northwest Food Processors v. Thomas* (9th Cir. No. 7216). These matters have now all been consolidated for briefing and oral argument before the Ninth Circuit, currently scheduled for the first week in March.

particular, the case involves the issue of when, and under what circumstances, the district courts may enjoin such an EPA order, where, because of the public health emergency presented, the order of suspension was initially entered temporarily, pending an opportunity for an administrative hearing.

The Ninth Circuit held in this case that under FIFRA, district court review is available for emergency, *but not for non-emergency*, suspensions even after the opportunity for agency review has been waived. That ruling is both patently erroneous and likely to seriously undermine EPA's ability to prevent illnesses and injuries due to the use of dangerous pesticides.

To understand why that is so, an appreciation of the role of emergency orders, and of administrative and judicial review of such orders, under FIFRA is necessary; we provide that background in Part I, *infra*. As we show in Part II, *infra*, given the structure and purposes of FIFRA generally and of FIFRA's review provisions particularly, the Ninth Circuit's ruling cannot possibly be justified. Indeed, as we show in Part III, *infra*, the court of appeals majority made no attempt whatever to justify its result as consistent with the statutory scheme and purposes as a whole; rather, the court below relied upon a series of syntactical quibbles to explain its result, each of which turn out, even upon a cursory examination, to be plainly incorrect.

By ignoring the overall statutory structure and reducing the inquiry as to reviewability to a semantic one, the court of appeals acted in a manner directly contrary to this Court's recent cases. This case merits this Court's attention not only for that reason but because what is at stake is a statutory provision that is of critical significance on rare but important occasions presented by public health emergencies. Because the Ninth Circuit's opinion will deter EPA from using the emergency powers that Congress granted to the Agency, this Court may not have

another opportunity to restore the EPA's authority to act decisively when the use of pesticides threatens to create a public health emergency before the next such occasion eventuates. To avoid that result and assure that the public health will be protected in the manner Congress, intended, *certiorari* should be granted and the decision of the Ninth Circuit reversed on jurisdictional grounds. Part IV, *infra*.

I. THE STATUTORY SCHEME

a. Under the statutory scheme involved here, Congress provided for three separate, and increasingly decisive, means for the Administrator to deal with pesticide chemicals he has determined may present a threat to human health.

First, whenever there is a "substantial question about the safety of a registered pesticide," the Administrator issues a notice of his intent to cancel its registration or change its classification. *See* FIFRA § 6(b), 7 U.S.C. § 136d(b); *Environmental Defense Fund, Inc. v. EPA*, 510 F.2d 1292, 1296 n.4 (D.C. Cir. 1975) (quoting *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 594 (D.C. Cir. 1971)).

Since such cancellation proceedings may take two years or more to complete, the Administrator may also issue a suspension of the pesticide registration pending the outcome of the cancellation proceedings where to do so "is necessary to prevent an imminent hazard." FIFRA § 6(c)(1), 7 U.S.C. § 136d(c)(1). Such a general "suspension order" must be preceded by notice to the registrants of the pesticide, with appropriate findings, and may not take effect until the registrants (*but not other affected persons*) have been provided an opportunity to request an expedited hearing on whether an imminent hazard exists. *Ibid.*

Finally, in extraordinary circumstances, the Administrator, in order to alleviate a public health emergency,

may issue an "emergency order" immediately suspending the registration of a pesticide and prohibiting its sale, distribution or use, pending the opportunity for an expedited hearing on the existence of an imminent hazard. FIFRA § 6(c)(3), 7 U.S.C. § 136d(c)(3). *See Dow Chemical Co. v. Blum*, 469 F. Supp. 892, 901 (E.D. Mich. (1979) (describing the three stages of pesticide cancellation proceedings as parallel to the three stages (temporary restraining order, preliminary injunction, and final injunction) of court injunctive proceedings).

Precisely because such emergency orders are by definition appropriate only in extraordinary circumstances, an emergency basis has not been invoked often.[8] While sparingly used, the ability of the Administrator to take decisive action in an emergency situation is of vital importance to the overall statutory scheme: Without plenary power to act immediately when necessary to protect the public, the EPA could not fulfill its basic mission "to protect the environment and the public from the misuse of unnecessary and dangerous pesticides." *Dow Chemical Co., supra*, 469 F. Supp. at 900, *quoting* 118 Cong. Rec. 32,259-60 (Sept. 26, 1972).

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[8] As far as petitioners are aware, only in three other instances has EPA found use of certain pesticides so hazardous as to constitute an emergency. The first of the earlier emergencies involved the pesticides 2,4, 5-T and Silvex. See *Dow Chemical Company v. Blum*, 469 F. Supp. 892 (E.D. Mich. 1979) These emergency suspensions were based on the judgment of EPA that pregnant women exposed to these toxic chemicals faced an immediate and unreasonable risk of spontaneous abortions. Both chemicals contained a form of dioxin that produced feto-toxic and teratogenic effects in animals at extremely low doses. An epidemiological study of the spraying of 2,4 5-T also documented spontaneous human abortions in women residing on the Western coast of Oregon. Upon obtaining information about these human abortions, the agency declared a public health emergency and imposed an immediate ban on the substances. *Id.* at 896. *See also*, Fed. Reg. 4452, Feb. 3, 1984 (emergency suspension of ethylene dibromide (EDB)).

b. At the same time, Congress recognized that there may be competing views regarding the danger of some pesticides, as well as pertinent considerations under the statute concerning the impact of banning a pesticide upon agricultural interests. Consequently, Congress carefully crafted FIFRA to provide both for administrative hearings upon the propriety of cancellation and suspension, as described above, and also for *limited* judicial review of various segments of the pesticide cancellation process, to be invoked by different categories of interested parties.

Thus, where the Administrator approves a final cancellation order after a hearing on the order has been held, "any person who will be adversely affected by such order and who has been a party to the [hearing]" may obtain judicial review in an appropriate court of appeals. FIFRA § 16(b), 7 U.S.C. § 136n(b). Similarly, where a hearing on an suspension order has been held, an adversely affected person who was a party to the hearing may, "within sixty days after entry of such order," seek review in a court of appeals, even though cancellation proceedings are still pending. FIFRA § 16(b), 7 U.S.C. § 136n(b); FIFRA § 6(c)(4), 7 U.S.C. § 136d (c)(4). However, "[i]f *no* request for a hearing is submitted to the agency within five days of the registrant's receipt of the notification. . . ., the suspension order may be issued and shall take effect and *shall not be reviewable by a court.*" FIFRA 6(c)(2), 7 U.S.C. § 163d (c)(2) (emphasis added). During the period of any emergency order "entered prior to a hearing," the statute moreover provides for "immediate," but limited, review in a judicial action "by the registrant or other interested person with the concurrence of the registrant in an appropriate district court." FIFRA § 6(c)(4), 7 U.S.C. § 136d(c)(4).

In sum, under the statutory scheme, it is plain that district court review is available to prevent abusive use

of the Administrator's authority to take interim action during a public health emergency, prior to the time a complete administrative hearing on the propriety of the underlying suspension can be held. The question on this case is whether, as the Ninth Circuit held, district court review of emergency orders continues to be available after all registrants have chosen to forego such a hearing on the suspension.

II. THE STATUTORY STRUCTURE AND PURPOSE

Looked at in light of the statutory structure and purposes of FIFRA, the dissenting judge's description of the result reached by the court of appeals on the jurisdictional issue as "bizarre" (App. 41a) is, if anything, charitable. Had this case involved a situation that EPA regarded as constituting an "imminent hazard", but *not* an "emergency", there is no doubt that once the registrants decided to forego a hearing on the suspension of the pesticide, users of the pesticide, such as the plaintiffs in this case, could *not* have challenged the suspension in court, The statute explicitly so states, and consistent with that language, the majority opinion below expressly so read the statute. App. 12a. Moreover, this result would follow even if, as here, agricultural users of the pesticide believed that the costs to them of banning the pesticide while the cancellation proceedings went forward were not adequately taken into account by EPA.

The Ninth Circuit's holding—that district court review is available for emergency, *but not non-emergency*, suspensions even after the opportunity for agency review has been waived—seriously undermines EPA's ability to act decisively when there is a public health emergency caused by a pesticide. Because such emergencies occur rarely but are of critical importance when they do occur, this Court should act now to correct the Ninth Circuit's patent error.

According to the court of appeals majority when, as here, EPA believes the danger posed by a particular

pesticide to be so grave as to constitute not only an "imminent hazard", but an extreme hazard—*viz.*, an "emergency"—a judgment that, as we have noted, EPA to our knowledge has made only three times in the sixteen year history of the statute. (n.8 *supra*), then *both* registrants and users of the pesticide suddenly acquire the right to seek district court review of the suspension *even after the opportunity for an administrative hearing on the validity of the suspension has come and gone.* The effect of this ruling is to confine review of a nonemergency suspension to the expert agency in the first instance, but to permit district court review of an emergency suspension without regard to whether or not available administrative remedies are used.

During the period that administrative review proceedings concerning the validity of the suspension order are still pending, there are critical differences between an emergency and a nonemergency suspension order that justifies district court review of the former. An emergency suspension is already in effect, but there has been *no* opportunity for review of its propriety, administrative *or* judicial; a nonemergency suspension is *only proposed*, and there will be an opportunity for administrative review before the suspension goes into effect. Once the opportnuity for administrative review has been waived, however, those distinctions no longer exists: in both instances, there was a chance for administrative review of the propriety of the suspension order which was waived, and in both instances the suspension order is now in effect.

In other words, providing for judicial review in lieu of administrative review of an emergency but not a nonemergency suspension order while administrative review proceedings are still pending makes sense, precisely because no administrative review is available concerning the propriety of the order *before* the order goes into effect. On that rationale, however, the opportunity for judicial

review should be cut off once the right to administrative review becomes available but is waived. Nowhere in the majority opinion is there any explanation at to why Congress may have wished, instead, to draw a distinction for review purposes—that on its face makes no sense whatsoever—between emergency and nonemergency suspensions. And there are several excellent reasons for regarding such a distinction as one fundamentally at odds with the statutory structure and purpose.

First, the majority opinion below does not face up to the fact that the review language of § 136d(c)(4) upon which the court below relies in terms permits review "by the registrant or other interested person with the concurrence of the registrant." Thus, there is no way to read the statute as permitting nonregistrants, but not registrants, to go to court once administrative remedies have been waived. Rather, it appears that under the Court of Appeals majority opinion, a registrant could intentionally forego administrative review of an emergency suspension and instead seek review in district court.[9]

Thus, the Court of Appeals' reading of the statute is inconsistent with very basic notions of required exhaustion of administrative remedies. *Block, supra*, 467 U.S. at 348. Those notions have particular force where, as here, technically complex issues are at stake, as to which both scientific training and experience in the field are essential to a reasoned decision. *See, e.g.*, Emergency Order, *supra* and Notice of Intent to Cancel *supra*. Here,

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[9] Moreover, even suits not filed by the registrants themselves could be be used by registrants to evade the administrative review process; to paraphrase this Court's observation in parallel circumstances under another stattue:

> [A registrant] would need only to find a [user] who is willing to join in or initiate an action in the district court. The [user] could then raise precisely the same exceptions that the [registrant could] raise administratively. [*Block v. Community Nutrition Institute*, 467 U.S. 340, 348 (1984)].

for example, the district judge, who presumably has no particular knowledge of this area, enjoined the suspension after a hearing lasting two days, less than two weeks after this suit was filed; suspension proceedings, in contrast, typically take several months, and are decided by an entity with both technical expertise and long experience evaluating the benefits and harms of pesticides.

b. Second, with respect to nonregistrants, the preclusion of judicial review is part of a series of considered Congressional decisions giving affected persons other than registrants some rights but not others to contest EPA pesticide decisions.[10] In particular, the statute gives adversely affected *nonregistrants* fewer rights to participate in the decisionmaking process with regard to suspensions than with regard to cancellations: Only registrants can demand a suspension hearing, while any "person adversely affected" by a cancellation notice can request a hearing. 7 U.S.C. § 136d(b) and (c)(1). And when there is an emergency suspension, Congress further limited the participation of nonregistrants in the administrative proceedings to the filing of briefs. 7 U.S.C. § 136d (c)(3). The purpose of the restrictions with regard to suspension hearings is, of course, to limit the availability of administrative review of suspension orders, given the short duration of such orders and the burden on the Agency of conducting both cancellation and suspension

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[10] *See, e.g.*, 7 U.S.C. § 136d(a) ("interested persons" can preclude the automatic cancellation of a pesticide after five years only "with the concurrenec of the registrant"); 7 U.S.C. § 136d(b) (any "person adversely affected" by a proposed cancellation order may request an administrative hearing); 7 U.S.C. § 136d(c)(3) (where an administrative hearing is requested by a registrant upon an emergency suspension order, parties other than the registrant may only participate by filing briefs); 7 U.S.C. § 136n(b) (adversely affected persons may contest EPA orders issued after public hearing, but only if they were parties to the administrative proceedings). *See generally McGill v. Environmental Protection Agency*, 593 F.2d 631 (5th Cir. 1979).

hearings. And, by further restricting nonregistrant participation in emergency suspension hearings, Congress confirmed its belief that, as a general matter, the interests of nonregistrants in suspension (as opposed to cancellation) of a pesticide can be adequately protected by the registrants.

Under the court of appeals majority's reasoning, however, this evident intent to preclude nonregistrants from interfering with the short-term suspension of a pesticide pending cancellation proceedings is fatally compromised. Instead, nonregistrants are given the power (again, for emergency suspensions *only*) of instigating a challenge of the suspension in court, even though the nonregistrants are precluded from instigating such a challenge before the Agency.[11] Yet, after an agency hearing has been waived, the interest of nonregistrants is no different with respect to emergency suspension orders than with respect to suspension orders generally.

c. Third, where the registrants decline to contest the suspension order administratively, the producers of the product have in effect agreed to a suspension of its registration during the period required to review in depth the risks and benefits of the product in order to decide whether its registration should be permanently cancelled. To allow third parties to second-guess that decision is to subject the registrants unwillingly to the possibility of major tort liability for any injuries that may occur while the EPA's initial determination that the product is unsafe

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[11] It is, of course, clear under the statute that affected nonregistrants can seek court review, with the concurrence of a registrant, of emergency suspension orders *until* the suspension proceedings are concluded by waiver or by completion of the hearing process. But that is quite different from giving nonregistrants the power to overturn a suspension in court that has been agreed to by the registrants, even though users are expressly precluded from instigating a challenge to the suspension before the Agency.

as explored in depth.[12] While FIFRA does require the "concurrence of a registrant" before a nonregistrant can bring a district court challenge, the court of appeals' opinion, if upheld, would permit the use of *all* dinoseb products, not only those registered to the concurring registrant. Thus, the court of appeals' result is inconsistent with an evident statutory intent to limit the ability of nonregistrants to interfere with the decision of registrants to withdraw their products from the market temporarily while cancellation proceedings go forward.

d. Fourth, the interest in foreclosing hasty judicial review where the risk is so great in EPA's view as to constitute an "emergency" initially is *stronger* than with respect to a situation in which no such emergency existed, not weaker. In this case, for example, it has been the unaltered conclusion of the Administrator, a conclusion the court of appeals did not question, that continued use of dinoseb represents an unusually serious and immediate hazard. *See* n.2, p. 5, *supra*. Where health risks are of this magnitude, the need to allow an expert agency to act to curb those risks without being second-guessed by a district court is manifest. If those more directly affected, the registrants, contest the risk asessment, or the benefit analysis against which the risk is balanced under the statute, they are free to bring their complaints to the expert agency by pursuing an expedited administrative hearing, reviewable by a court of appeals. Where the

[12] Again, it is true that FIFRA does not permit limited district court review invoked by nonregistrants of emergency suspension orders. But, as we read the statute, that permission is limited to (1) the five day period during which the initial decision of registrants whether to seek a hearing is made (7 U.S.C. § 136d(c)(2)); and (2) the period after at least one registrant has sought a hearing, and the hearing is pending. Where, instead, *all* registrants have already concurred in the conclusion that the Agency has a sufficiently strong case of imminent harm that a suspension should not be challenged, the danger of subjecting unwilling registrants to unwanted liability exposure is greatly heightened.

registrants do not pursue that course, it is presumably because the registrants do not believe they can prevail. To permit court intervention in that circumstance when there could be no such intervention if the emergency were less severe is perverse.

III. THE STATUTORY LANGUAGE

Without discussing at all any of these policy considerations, and while admitting that "EPA's position is not implausible" (App. 15a), the panel majority's opinion nonetheless comes to a contrary result. The basis for so doing is a set of linguistic quibbles with the compelling reading of the statute outlined above. Such a stilted approach to interpreting an intricate statutory scheme is in any event inappropriate; "the judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar." Posner, *Statutory Interpretation—In the Classroom and In the Courtroom*, 50 U. Chi. L. Rev. 800, 817 (1983). But in this instance, the fact is that each of the linguistic and grammatical premises upon which the majority below based its anomalous statutory construction is, as a simple matter of language and syntax, patently incorrect.

First, the basic premise below is that this is a case in which "two provisions in the same statute . . . apparently conflict," so that "[i]t is . . . up to the courts to make sense of these apparent inconsistencies." App. 12a. The apparently conflicting provisions, according to the court of appeals majority, are § 6(c)(4) of FIFRA, which permits "*immediate* review" (emphasis supplied) of "[a]ny order of suspension entered prior to a hearing", and § 6(c)(3), providing "[i]f no request for a hearing is submitted . . . within five days . . . the suspension . . . shall not be reviewable by a court."

It is difficult to see what is inconsistent about these provisions: By stressing that review under § 6(c)(4) must be "immediate", and speaking of an order issued "*prior*

to" (not "without") a hearing, Congress limited § 6(c)(4) to prompt review of an emergency order *while an administrative hearing is pending*. Once that hearing is no longer pending because the opportunity has been waived, any review sought is neither "immediate" nor, it turns out, will any resulting order be entered "prior to" a hearing.

Second, the court of appeals maintained that the prohibition in § 6(c)(2) upon review of suspension orders where no administrative hearing was sought cannot apply to an emergency suspension order because the statute "provides for issuance of a *final* suspension order only in those cases where there is an administrative hearing," (emphasis supplied), so that "when no hearing is held, the emergency suspension order simply stays in effect until the cancellation . . . proceedings are completed." App. 13a. But the portion of § 6(c)(2), incorporated in § 6(c)(3), that precludes judicial review if no hearing is requested does not refer to any special form of suspension order termed a "final" suspension order. Rather, the provision states only that "[i]f no request for a hearing is submitted to the Agency within five days of the registrant's receipt of the notification provided for by paragraph (1), *the suspension order* . . . shall not be reviewable by a court." (Emphasis supplied). Nor is there any provision in FIFRA for issuing a 'final" suspension order for a *non*emergency suspension where no hearing is requested. Thus, the linguistic dichotomy the majority sought to draw between emergency suspension orders in which hearings are waived but no "final" order issues, and nonemergency orders in which hearings are waived and there is a "final" order, simply does not exist in the statute itself.[13]

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[13] Moreover, it is implausible in any event that Congress would intend reviewability to depend upon whether EPA issues a separate paper denominated a "final" suspension order or, instead, as here, simply announced that the previously issued suspension order had become final.

Moreover, the court of appeals majority maintained that § 6(c)(3) cannot incorporate the part of § 6(c)(2) that precludes review because the sentence in which that preclusion occurs provides that if no hearing is requested "the suspension order may be issued and shall take effect *and* shall not be reviewable by a court" (emphasis supplied); because an emergency suspension order has already issued and taken effect, said the majority below, the *entire sentence* in which the review preclusion occurs must not be applicable to emergency orders. App. 14a. But the three clauses of the quoted sentence are joined by conjunctions, and are conceptually independent. And § 6(c)(3) in terms makes *all* of § 6(c)(2) applicable to emergency orders, with the exception, *inter alia*, of the first two clauses of the quoted sentence of § 6(c)(2), *but not the third.* ("[P]aragraph (2) shall apply except that (1) the order of suspension shall be in effect pending [the suspension hearing]". . . .) Thus, while some parts of § 6(c)(2) are inapplicable to § 6(c)(3) orders, there is no basis for reading out of the statute those conceptually and grammatically separate directives that are *not* inapplicable just because they appear in the same sentence as the inapplicable provisions.

Further, the court of appeals majority rejected the position we urge here because, while § 6(c)(4) provides that the district court action "*may* be maintained simultaneously with any administrative review proceeding under this section" (emphasis supplied), our position *requires* that judicial and administrative review be pursued simultaneously. App. 15a. But that is certainly not our position: Obviously, interested parties are free, under our construction of the statute, to pursue administrative remedies only. Moreover, the most natural reading of the quoted sentence is only to make clear that the mere pendency of judicial review should not stay, even temporarily, the administrative proceedings from going forward simultaneously.

Finally, the fact the § 6(c)(4) "authorizes the district court to enter a stay of the order 'pending the Administrator's final decision with respect to cancellation or change in classification,'" (App. 14a), does not indicate that the district court's review authority over emergency orders persists until the cancellation proceedings are complete. The court of appeals majority failed to recognize that § 6(c)(4) contains *two* different review provisions: The first sentence of the section pertains to review in the court of appeals of suspension order issued *after* hearing, while the second sentence pertains to review in the district court of orders issued *prior* to a hearing. The relief sentence is the third sentence in the section, and, it would appear, applies to *both* of the preceding sentences.

As to review of a suspension hearing by the court of appeals after a full hearing, providing that "'[t]he effect of any order of the court will be only to stay the effectiveness of the suspension order, pending a hearing before the Administrator'" (App. 14a-15a, *quoting* S. Rep. No. 838, 92d Cong., 2d Sess.) would have been entirely inappropriate. By allowing for the possibility of a broader order, but stating the provision in terms of limitation ("[t]he effect of any order will be *only* to stay the effectiveness of the suspension order, pending the Administrator's final decision with respect to cancellation or change in classification" (emphasis supplied)), Congress was simply making clear that under the proper circumstances—that is, where the suspension order was issued after hearing—the stay could extend until the end of the cancellation proceedings; Congress was *not* directing courts always to issue such broad orders where not called for in a particular case. *Cf. Hecht Co. v. Bowles*, 321 U.S. 321 (1944).

IV. THE IMPORTANCE OF THIS CASE

This Court has explained that in determining whether a particular statute precludes judicial review of agency

action at the behest of certain parties, "unambiguous proof, in the traditional evidentiary sense, of a congressional intent to preclude judicial review at [the particular plaintiff's] behest" is unnecessary. *Block v. Community Nutrition Institute, supra,* 467 U.S. at 351. Rather, "[t]he presumption favoring judicial review of administrative action is just that—a presumption" and "may be overcome by [*inter alia*] specific language or . . . inferences of intent drawn from the statutory scheme as a whole." *Id.* at 349. *See also United States v. Fausto,* —— U.S. ——, 108 S.Ct. 668, 671-75 (1988).

In concluding that Congress intended to allow judicial review of emergency suspension orders under FIFRA even when the right to an administrative hearing on the order was waived, the court of appeals majority gave lip service to this Court's *Block* opinion (App. 16a), but did not in fact follow the "balanced approach to statutory construction" mandated by this Court in *Block. See* 467 U.S. at 350; *see also Morris v. Gressette,* 432 U.S. 491 (1977). Instead, the Ninth Circuit proceeded to search for a "*clear* command of the statute" (App. 16a), and in so doing placed its entire reliance on a series of sterile grammatical points. Nowhere did the majority below attempt to fit its conclusions into the statutory scheme as a whole, or explain why Congres would conceivably devise a system of review such as the one created by the opinion below. Thus, the court of appeals approach is in clear conflict with this Court's pronouncements concerning the reviewability of administrative decisions, and merits this Court's attention for that reason alone.

Further, as we have demonstrated (Part III, *supra*), by failing to factor in at all the statutory structure or purposes, as this Court's precedents command, the Court of Appeals majority attributed to Congress an absurd intent likely to undermine the ability of EPA to act decisively where health emergencies exist. If the decision of the majority below is left intact, then the EPA Administrator

will be severely deterred from exercising his emergency suspension authority in the future. To do so would subject the agency to the possibility of simultaneous suits before several of the hundreds of district court judges, none of whom have the accumulated technical knowledge and expertise of the Agency itself, in lieu of the single administrative hearing provided for by the statute.

The likely administrative response to that possibility will be to allow the use of pesticides while the opportunity for a suspension hearing is pending, in the perfectly rational belief that under the court of appeals' holding, the pesticide may be removed from the market *more expeditiously* if *no* emergency order is issued than if an emergency order is involved. But the price of such a response will be to allow the use of, and exposure to, extremely dangerous substances to continue while statutory procedures are exhausted, a price that Congress explicitly intended to eliminate by creating the emergency order option in the first place.

Thus, the effect of the present case promises to be to inhibit the Agency from using its emergency powers at all.[14] Consequently, given the importance of the issue and the chilling effect on the use of EPA's power to prevent an imminent health hazard, the Ninth Circuit's patent error should be corrected by this Court now, before the next pesticide emergency arises.

CONCLUSION

For the reasons stated above, this Court should grant *certiorari* and reverse the judgment of the court of appeals.

Respectfully submitted,

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[14] In the only other case concerning the issue presented here, the district court expressly rejected the conclusion of the district court in this case, and there was no appeal. *Nagel v. Thomas*, 666 F. Supp. 1002 (W.D. Mich. 1987). In addition, the general view of the emergency order provision taken in *Dow Chemical Co., supra*, is inconsistent with the decision below.

(2) 88-1255

Supreme Court, U.S.
FILED
JAN 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS; NATURAL RESOURCES DEFENSE COUNCIL, INC.; *et al.*,
Petitioners,

v.

JAMES M. LOVE, *et al.*,

DAVID FROHNMAYER, Attorney General for the State of Oregon,

and

JOHN A. MOORE, Acting Administrator, United States Environmental Protection Agency
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-3866

D.C. No. CV 87-0343-JAR

JAMES M. LOVE;
NORTHWEST FOOD PROCESSORS ASSOCIATION;
TUALATIN VALLEY FRUIT MARKETING, INC.;
Plaintiffs-Appellees;

DAVE FROHNMAYER, Attorney General for the
State of Oregon, on behalf of the
people of the state of Oregon,
Intervenor-Appellee;

v.

LEE M. THOMAS, Administrator,
United States Environmental Protection Agency,
Defendant-Appellant;

AMERICAN FEDERATION OF LABOR—CONGRESS OF INDUSTRIAL ORGANIZATIONS; NATURAL RESOURCES DEFENSE COUNCIL, INC.; UNITED FARMWORKERS OF WASHINGTON STATE; PINEROS Y CAMPESINOS UNIDOS DEL NOROESTE, INC.; CHRISTINA ESQUIVEL; DIANA GUZMAN; ALICIA PRIETO; AURORA LEON; ZENAIDA PRIETO; MARIA ESQUIVEL; CONSTANCIO MARTINEZ; JUAN PRIETO, JR.; ENRIQUE PRIETO; ANTONIO LEON;
Intervenors.

Appeal from the United States District Court
for the District of Oregon
James A. Redden, District Judge, Presiding

Argued and Submitted
July 17, 1987—San Francisco, California

Filed January 29, 1988

Before: J. Blaine Anderson, William A. Norris and Alex Kozinski, Circuit Judges

Opinion by Judge Kozinski; Dissent by Judge Norris

John A. Bryson, United States Department of Justice, Washington, D.C., for the defendant-appellant.

Susan K. Eggum, McEwen, Gisvold, Rankin & Stewart, Portland, Oregon; Phillip D. Chadsey and Charles F. Adams, Stoel Rives Boley Jones & Grey, Portland, Oregon, for the plaintiffs-appellees.

Arden J. Olson, Assistant Attorney General, State of Oregon, for the intervenor-appellee.

Albert H. Meyerhoff, Natural Resources Defense Council, Inc., San Francisco, California, for the intervenors.

OPINION

KOZINSKI, Circuit Judge:

Farmers and food processors in the Pacific Northwest brought this lawsuit to enjoin the Environmental Protection Agency from suspending registrations of the pesticide dinoseb (2-sec-butyl-4, 6-dinitrophenol). Plaintiffs use products containing dinoseb or its salts in the cultivation of green peas, snap beans, cucurbits and caneberries.[1] As counsel for the State of Oregon dramatically

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[1] Snap beans include green beans, wax beans and romano beans. Cucurbits are members of the gourd family, which includes cucumbers, pumpkins, squash and zucchini. Caneberries comprise red raspberries, blackberries, boysenberries and loganberries.

proclaimed at oral argument, this case "essentially is . . . about whether we'll be able to have raspberries next year."

FACTS

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C.A. §§ 136-136y (1980 & Supp. 1987), establishes an elaborate framework for the regulation of pesticide use in the United States. No pesticide may be sold or distributed unless it is registered with the EPA. FIFRA §§ 3(a), 12(a)(1)(A), 7 U.S.C.A. §§ 136a(a), 136j(a)(1)(A). In order to register a pesticide, an applicant, who may be a manufacturer or user of the product, must demonstrate with sufficient scientific evidence that, "when used in accordance with widespread and commonly recognized practice[, the pesticide] will not generally cause unreasonable adverse effects on the environment." FIFRA § 3(c)(5)(D), 7 U.S.C.A. § 136a(c)(5)(D). After a pesticide has been registered, the FPA Administrator must issue a notice of his intent to cancel its registration or change its classification " 'whenever there is a substantial question about the safety of a registered pesticide.' " *Environmental Defense Fund, Inc.* v. *EPA*, 510 F.2d 1292, 1296 n.4 (D.C. Cir. 1975) (quoting *Environmental Defense Fund, Inc.* v. *Ruckelshaus*, 439 F.2d 584, 594 (D.C.Cir. 1971)); *see* FIFRA § 6(b), 7 U.S.C.A. § 136d(b).

Because cancellation or reclassification proceedings may take one or two years to complete,[2] FIFRA authorizes the Administrator to suspend a pesticide's registration pending the outcome of the proceedings if he determines that suspension "is necessary to prevent an imminent

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[2] In this case, the Administrator has "assumed that a cancellation hearing concerning the various registered dinoseb products would require approximately 18 months." Decision and Emergency Order Suspending the Registrations of All Pesticide Products Containing Dinoseb, 51 Fed. Reg. 36634, 36635 (EPA Oct. 14, 1986).

hazard." FIFRA § 6(c)(1), 7 U.S.C.A. § 136d(c)(1).[3] Absent an emergency, the Administrator may not issue a suspension order until he has done two things: (1) notified registrants of the pesticide that he intends to cancel the registration and that he will issue a suspension order based upon "findings pertaining to the question of "imminent hazard,' " which he must include in the notice; and (2) given registrants an opportunity for an "expedited hearing" on "whether an imminent hazard exists." FIFRA § 6(c)(1), 7 U.S.C.A. § 136d(c)(1).

Dinoseb is a pesticide registered for use as an herbicide, insecticide, fungicide and desiccant, and has been used in the United States for nearly forty years. It is applied primarily as a contact herbicide to control broadleaf weeds and as a desiccant on caneberries to suppress growth that would obstruct harvesting. Decision and Emergency Order Suspending the Registrations of All Pesticide Products Containing Dinoseb, 51 Fed. Reg. 36634, 36635 (EPA Oct. 14, 1986) [hereinafter Emergency Order]; Intent to Cancel and Deny All Registrations for Pesticide Products Containing Dinoseb, 51 Fed. Reg. 36650, 36657-58 (EPA Oct. 14, 1986) [hereinafter Notice of Intent]. In October 1986 there was nearly three hundred federal registrations for pesticides containing dinoseb or its salts.

In the spring of 1986, the EPA developed doubts about the safety of dinoseb. Preliminary studies showed that dinoseb may cause serious health risks to persons exposed to it, including sterility in men and birth defects in the unborn children of pregnant women. Emergency Order, 51 Fed. Reg. at 36636-38. In October 1986, the

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[3] "Imminent hazard" is not limited to a crisis: "It is enough if there is substantial likelihood that serious harm will be experienced during the year or two required in any realistic projection of the administrative process." *Environmental Defense Fund, Inc.* v. *EPA*, 465 F.2d 528, 540 (D.C. Cir. 1972), *quoted in Environmental Defense Fund*, 510 F.2d at 1297.

EPA began proceedings to cancel all dinoseb registrations. *See* Notice of Intent, 51 Fed. Reg. at 36650. On October 7, the Administrator issued an emergency suspension order under section 6(c)(3) of FIFRA, 7 U.S.C.A. § 136d(c)(3), prohibiting the sale, distribution and use of dinoseb pending the completion of the cancellation proceedings. Emergency Order, 51 Fed. Reg. at 36634, 36648.[4] The order, along with a notice of intent to cancel all registrations, was mailed to the registrants of dinoseb, and was subsequently published in the Federal Register. *Id.* at 36634. Four registrants requested a hearing on the emergency suspension order.[5] The hearing convened on October 20 before an administrative law judge but, for reasons not apparent from the record, the registrants jointly withdrew their requests ten days later.

Plaintiffs, as nonregistrant users of dinoseb, are not permitted by FIFRA to initiate an expedited administrative hearing on the suspension order.[6] However, under EPA regulations they were permitted to and did petition

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[4] Six registrants, including the four that initially requested an expedited hearing on the suspension order, have requested cancellation hearings as to 37 registrations; those proceedings are pending. Hearing Concerning Application to Modify the Final Suspension Order for Pesticide Products Containing Dinoseb, 52 Fed. Reg. 4963, 4965 (EPA February 18, 1987) [hereinafter Notice of Hearing]. The rest of the registrations in effect in October 1986 have been cancelled automatically under FIFRA § 6(b), 7 U.S.C.A. § 136d(b).

[5] Uniroyal, Inc., Cedar Chemical Corp., Drexel Chemical Co. and A.H. Marks & Co. filed requests for a hearing on October 14, 15, 20 and 27, 1986, respectively.

[6] Nonregistrants may intervene in ordinary suspension hearings. *See* 40 C.F.R. § 164.121(e)(2) (1986) (nonregistrants "may file proposed findings and conclusions and briefs in support thereof"). By statute, however, their intervention in expedited hearings on emergency suspension orders is limited to filing briefs. FIFRA § 6(c)(3), 7 U.S.C.A. § 136d(c)(3).

on behalf of growers in Washington, Oregon and Idaho for a so-called "subpart D" reconsideration of the suspension. *See* 40 C.F.R. §§ 164.130-133 (1986).[7] The EPA denied the petitions of plaintiff Northwest Food Processors Association and others, supported by applications from the three states, with respect to green peas, snap beans and lima beans on April 1, 1987. *See* Denial of Hearing Concerning Application to Modify the Final Suspension Order for Pesticide Products Containing Dinoseb, 52 Fed. Reg. 11119, 11121 (EPA April 7, 1987). The EPA had not acted with regard to caneberries and cucurbits at the time the district court enjoined enforcement of the suspension order. *See id.* at 11120.

On April 3, 1987, with the growing season upon them, plaintiffs rushed into district court seeking relief from

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[7] Under EPA regulations, adversely affected persons may, even without the concurrence of a registrant, petition the Administrator for reconsideration of the suspension order. Under subpart D of 40 C.F.R. pt. 164, petitioner must present substantial new evidence that may materially affect the prior suspension and that could not have been discovered with due diligence before the suspension order. If it meets this threshold, the EPA will conduct an adjudicatory hearing on whether to modify the suspension order as to those growers. Denial of the petition constitutes final agency action subject to review. FIFRA § 16, 7 U.S.C.A. § 136n; 40 C.F.R. § 164.131(b).

Producers of dry peas, chickpeas and lentils in the Palouse region of the Pacific Northwest petitioned for reconsideration. On February 11, 1987, the Administrator granted the subpart D hearing requests as to those three crops grown in Idaho and Washington. *See* Notice of Hearing, 52 Fed. Reg. 4963. On March 30, the Administrator issued his Decision and Final Order Modifying Final Suspension of Pestice Products Which Contain Dinoseb, and permitted application of dinoseb to those crops in Washington and Idaho with certain restrictions. On April 3, he granted the subpart D hearing request as to those same crops in Oregon. *See* Notice of Hearing Concerning Application to Modify the Final Suspension Order for Pesticide Products Containing Dinoseb, 52 Fed. Reg. 11333, 11335 (EPA April 8, 1987).

the EPA's suspension order. The growers' argument was quite straightforward. They simply could not grow their crops without dinoseb. Unlike farmers in other parts of the country, farmers in the Northwest have no substitututes for dinoseb. Climatic conditions and the prevalence of certain pests, black nightshade in particular, make dinoseb the only effective pesticide available on the market. For example, the farmers argued without dinoseb there would be no caneberry crop in the Pacific Northwest, where 95 percent of the nation's commercial caneberry crop is grown. Potential crop losses would amount to $39.2 million this year. *See Love* v. *Thomas*, No. 87-343-RE, slip op. at 18-19 (D. Or. May 21, 1987) [hereinafter Dist. Ct. op.]; 2 Reporter's Transcript (RT) at 257.

On April 15, 1987, after a two-day hearing, the district court asserted jurisdiction on the basis of section 6(c)(4) of FIFRA, 7 U.S.C.A. § 136d(c)(4). *See* Dist. Ct. op. at 9, 12. It then preliminarily enjoined enforcement of the suspension order pending completion of the EPA's cancellation proceedings, and allowed use of dinoseb subject to twelve conditions, *see* pp. 1208-1211 *infra*, patterning the injunction after the EPA's modification of its suspension order as to certain other crops, *see* p. 1185 n.7 *supra*. The court permitted limited sales of dinoseb to growers of certain crops; prohibited uncertified applicators from using the pesticide; barred "[w]omen of child-bearing age, i.e., under the age of 45," from "any aspect of dinoseb application"; restricted the manner and extent of application of dinoseb to crops; and set standards for applicator clothing and exposure. *See Love* v. *Thomas*, No. 87-343-RE, at 2-4 (D. Or. April 15, 1987) [hereinafter Preliminary Injunction], *quoted* at pp. 1208-1211 *infra*.[8] The court entered final judgment on May 1, 1987, and the EPA timely appealed.

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[8] The restrictions are all designed to protect dinoseb applicators against potential hazards. There is no apparent risk to consumers. *See* 1 RT at 162.

The Parties and Their Contentions

The EPA's appeal is supported by certain intervenors, including various labor unions that represent agricultural workers ("the unions"). Plaintiffs defend the district court's judgment with the support of the State of Oregon, which intervened below.

The EPA argues that the district court lacked jurisdiction to review the suspension order. On the merits, the EPA argues that the court erred in invalidating the suspension order and enjoining enforcement. The unions support the EPA and in addition argue that the district court's order denied farmworkers equal protection because it treated men and women disparately. Plaintiffs and the State of Oregon vigorously assert that the district court had jurisdiction and urge us to uphold its judgment.

Discussion

I.

The first question we must address is that of jurisdiction.[9] That turns out to be a difficult issue, requiring close analysis of a rather convoluted statutory provision. As noted earlier, when the EPA commences proceedings to cancel the registration of a pesticide, it may, at the same time, issue a notice that it intends to suspend the registration pending the outcome of the cancellation proceedings. Such suspension normally does not become effective immediately. Rather, upon receipt of the notice

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[9] We review de novo the question of judicial review. *Pescosolido* v. *Block*, 765 F.2d 827, 831 (9th Cir. 1985). We reject appellant's suggestion that we defer to the EPA's construction of the judicial review provisions of FIFRA. While we ordinarily give great weight to the interpretation of the agency charged with enforcement of the statute we are construing, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), that deference does not extend to the question of judicial review, a matter within the peculiar expertise of the courts.

the registrant has five days within which to request an expedited hearing on the issue of imminent hazard. FIFRA § 6(c)(2), 7 U.S.C.A. § 136d(c)(2). If a hearing is requested, the suspension is automatically stayed until the matter has been heard by an administrative law judge and the Administrator, having reviewed his findings, issues a final order. *Id.* But "[i]f no request for hearing is submitted to the Agency within five days of the registrant's receipt of the notification . . . , the suspension order may be issued and shall take effect and *shall not be reviewable by a court.*" FIFRA § 6(c)(2), 7 U.S.C.A. § 136d(c)(2) (emphasis added.)

Because the expedited hearing may take a month or more,[10] during which time the pesticide could continue to be used, FIFRA provides an exception to this procedure. Where the Administrator determines that an emergency exists, he may issue the suspension order "in advance of notification to the registrant. FIFRA § 6(c)(3), 7 U.S.C.A. § 136d(c)(3). If the EPA issues such an emergency order, many of the same procedures apply as with ordinary orders,[11] but the suspension goes into effect immediately and remains in effect pending the result of the expedited hearing.

The statute provides for review in the court of appeals of a suspension order issued following a hearing, notwithstanding the fact that the cancellation proceedings may be continuing before the Agency. FIFRA § 6(c)(4), 7 U.S.C.A. § 136d(c)(4). As to "[a]ny order of sus-

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[10] In this case, the Administrator had "assumed that a suspension hearing would require approximately four months." Emergency Order, 51 Fed. Reg. at 36636.

[11] Under subsection (c)(3), only registrants and the agency may participate in the hearing process, although "any person adversely affected may file briefs within the time allotted by the Agency's rules." FIFRA § 6(c)(3), 7 U.S.C.A. § 136d(c)(3). Anyone filing briefs thereby becomes a party to the proceeeding for the purpose of seeking judicial review.

pension entered prior to a hearing," the statute provides for "immediate review in an action by the registrant or other interested person with the concurrence of the registrant in an appropriate district court." *Id.*[12] The scope of district court review is limited, however, to determining whether the order was "arbitrary, capricious or an abuse of discretion, or whether the order was issued in accordance with the procedures established by law." FIFRA § 6(c)(4), 7 U.S.C.A. § 136d(c)(4). The district court action, moreover, "may be maintained simultaneously with any administratice review proceeding under [section 6(c)]." *Id.*

The EPA argues that judicial review is barred by section 6(c)(2), which provides, in what the EPA contends are the plainest possible terms, that if the registrants do not request a hearing, the suspension order becomes final and "shall not be reviewable by a court." The district court rejected this contention, noting that this is not a case where the registrants failed to request a hearing: Four registrants in fact asked for an expedited hearing but evenutally decided not to go forward with the process. Giving the statute a literal reading, the court held that judicial review is not barred. *See* Dist. Ct. op. at 10-11, 12.

Plaintiffs do not rely on the district court's rationale. Instead, they point to the language of section 6(c)(4), which deals expressly with judicial review.[13] In that sec-

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[12] Plaintiffs are undoubtedly "interested persons" within the meaning of this section. *See McGill* v. *EPA*, 593 F.2d 631, 635-36 (5th Cir. 1979) (finding that the legislative history of FIFRA strongly suggests that "interested persons" include pesticide users). They sought review with the concurrence of Cedar Chemical Co., one of the registrant manufacturers that had initially requested an expedited hearing. CR 18 ¶ 6; *see* 2 RT at 265, 268.

[13] Section 6(c)(4), 7 U.S.C.A. § 136d(c)(4), provides in relevant part:

> A final order on the question of suspension following a hearing shall be reviewable in accordance with section 136n of this

tion Congress provides for judicial review of two types of suspension orders, those entered after and those entered before a hearing. The latter category, plaintiffs argue, defines emergency suspension orders which, by their terms, are issued and become effective before a hearing can be held. Plaintiffs argue that if subsection (c) (2) bars judicial review, the second sentence of subsection (c) (4) becomes surplusage.

A. We find the district court's asserted ground for jurisdiction unpersuasive. While it is true that some of the registrants sought a hearing, they subsequently withdrew their requests. It is quite obvious that the provision barring judicial review where no hearing is requested applies with equal force where a hearing is first requested and the request is then withdrawn. In either case, the registrants—those persons most directly affected by the suspension order—have waived their right to administrative remedies in the form of a review by an administrative law judge. There is no less a waiver when the registrant first asks for a hearing and then changes his mind than when he asks for no hearing in the first place. *See Nagel* v. *Thomas*, 666 F. Supp. 1002, 1006-07 (W.D. Mich. 1987) (dinoseb registrants' request for hearing and later withdrawal thereof is the functional equivalent of no request.)

B. This leaves the question whether judicial review of an emergency suspension is barred when no registrant timely requests a hearing. As is often the case where

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title, notwithstanding the fact that any related cancellation proceedings have not been completed. Any order of suspension entered prior to a hearing before the Administrator shall be subject to immediate review in an action by the registrant or other interested person with the concurrence of the registrant in an appropriate district court, solely to determine whether the order of suspension was arbitrary, capricious or an abuse of discretion, or whether the order was issued in accordance with the procedures established by law.

Congress drafts complex statutes, the various provisions do not fit with surgical precision. While the statute's meaning may be clear as to most of the situations it covers, cases may arise where two provisions in the same statute, or in different statutes, apparently conflict. It is then up to the courts to make sense of these apparent inconsistencies.

This is such a case. On the one hand, Congress provided for immediate judicial review of emergency suspension orders. FIFRA § 6(c)(4), 7 U.S.C. § 136d(c)(4). On the other, it provided in the most categorical terms that judicial review of suspension orders is precluded where the registrant waives its rights to an administrative hearing. FIFRA § 6(c)(2), 7 U.S.C.A. § 136(c)(2). The conflict is exacerbated somewhat by the fact that judicial review of an emergency suspension order may be sought by any "interested person" with the concurrence of a registrant, while administrative review may be requested only by the registrant itself. If possible, we must give these apparently conflicting provisions a sensible reading that avoids redundancy or surplusage.

We find such a construction possible. FIFRA § 6(c)(4) authorizes the district courts to review EPA orders entered "prior to a hearing." This phrase potentially embraces two categories of suspension orders: ordinary orders issued after registrants waive a hearing, and emergency orders issued before an opportunity therefor. Since ordinary orders entered after waiver of a hearing are made unreviewable under subsection (c)(2), subsection (c)(4) must authorize district courts to review emergency suspension orders, if it is to have any meaning at all.

The EPA does not seriously dispute this construction. It argues, however, that the district court may review emergency suspension orders under subsection (c)(4) only so long as they are in fact emergency suspension orders, that is, pending an opportunity for an agency

hearing. If a hearing is held, the EPA's argument continues, the final suspension order is reviewable in the courts of appeals.[14] If, on the other hand, a hearing is waived (as was the case here), the final suspension order is entered by operation of law and, under subsection (c)(2), is not reviewable.

FIFRA, however, provides for the issuance of a final suspension order only in those cases where there is an administrative hearing. There is no provision for entering a separate final suspension order if no hearing is held after issuance of an emergency order, and none in fact was entered in this case.[15] The EPA invites us to create a procedural fiction to the effect that a final suspension order follows an emergency order whenever a hearing is waived. We see no reason for doing so. As we read the statute, when no hearing is held, the emergency suspension order simply stays in effect until the cancellation or classification proceedings are completed, or, as in this case, until stayed by the district court.

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[14] *See* FIFRA § 6(c)(4), 7 U.S.C.A. § 136d(c)(4) ("[a] final order on the question of suspension following a hearing shall be reviewable in accordance with section 136n of this title"); FIFRA § 6(e), 7 U.S.C.A. § 136d(f) ("[f]inal orders of the Administrator under this section shall be subject to judicial review pursuant to section 136n of this title"); FIFRA § 16(b), 7 U.S.C.A. § 136n(b) (providing for court of appeals review of "any order issued by the Administrator following a public hearing").

[15] The Department of Justice described the EPA's suspension procedure in this case in a letter to the court:

> There is no separate order that constitutes a "final suspension". Rather, as recited in the October 7 Emergency Suspension Order, see 51 Fed. Reg. at 36648, the failure to request an expedited hearing on the order means that the suspension becomes final, *by operation of law*. Since the requests that had been made were withdrawn . . . , the order automatically became final on October 30, 1986.

Letter from Peter R. Steenland, Jr. to Betty Parshall (Aug. 7, 1987) (emphasis original).

The EPA also argues that subsection (c)(3), which provides for the issuance of emergency suspension orders, by its terms incorporates subsection (c)(2), including the provision prohibiting judicial review where no registrant requests a hearing. However, the language of subsection (c)(2) indicates that this prohibition against judicial review applies only to those situations where the agency has given notice of its intent to issue a *non-emergency* suspension order: "If no request for a hearing is submitted to the Agency within five days of the registrant's receipt of the notification provided for by paragraph (1), *the suspension order may be issued and shall take effect* and shall not be reviewable by a court." FIFRA § 6(c)(2), 7 U.S.C.A. § 136d(c)(2) (emphasis added). In the emergency case, the suspension order has already issued and taken effect before any notice to the registrants and opportunity for a hearing. This first sentence of subsection (c)(2), unlike the other provisions of that subsection which concern hearing procedures, simply does not make sense in the emergency context and must therefore be limited to ordinary suspension orders issued after notice. *Contra Nagel*, 666 F. Supp. at 1007-08 (finding no jurisdiction to hear Michigan gladiolus growers' challenge to dinoseb suspension order).

The EPA's argument that the district courts' jurisdiction expires with waiver of a hearing also does not fully comport with the language or drafting history of the provision. Subsection (c)(4) authorizes the district court to enter a stay of the order "pending the Administrator's final decision with respect to cancellation or change in classification." FIFRA § 6(c)(4), 7 U.S.C.A. § 136d(c)(4). Had Congress meant for the district court to act only until administrative review was waived or concluded, the statute would have so provided. In fact, the Senate Agriculture and Forestry Committee reported out a bill providing precisely that: "The effect of any order of the court will be only to stay the effectiveness of the

suspension order, pending hearing before the Administrator." S. Rep. No. 838, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993, 4068. That provision was amended to the current form by the conference committee. *See* Conf. Rep. No. 4540, *reprinted in* 1972 U.S. Code Cong. & Admin. News 4130, 4132-33. That Congress gave the district court authority to stay suspension orders long after any administrative hearing on suspension, up to the time when the EPA has ruled on the cancellation or reclassification, strongly suggests that the district court's jurisdiction is not limited in the fashion suggested by the EPA.

We see one final anomaly in the EPA's position, albeit a minor one. Subsection (c)(4) provides that the district court action "*may* be maintained simultaneously with any administrative review proceeding under this section" (emphasis added). As the EPA would have us interpret the statute, judicial review could *only* be maintained simultaneously with administrative review because if no administrative review is sought, under the EPA's view, the right to judicial review would be cut off. We decline to change the statutory "may" to a "must."

We recognize that this issue is far from clear-cut. The EPA's position is not implausible and, quite frankly, neither side advances an entirely satisfactory construction or a statute that obviously was the product of some controversy and considerable compromise. The courts have long recognized, however, a presumption in favor of judicial review of administrative actions. *See Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 350-51 (1984) (presumption only overcome when "the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme' "); *Ruff* v. *Hodel*, 770 F.2d 839, 840 (9th Cir. 1985) ("[t]he bar to judicial review . . . requires a 'persuasive reason to believe' that Congress intended to preclude judicial review") (quoting *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967));

Moapa Band of Paiute Indians v. *Department of Interior*, 747 F.2d 563, 565 (9th Cir. 1984) ("[p]reclusion of judicial review is not lightly inferred, and usually will not be found absent a clear command of the statute"). Moreover, we construe prohibitions against judicial review narrowly. *Cf. Wallace* v. *Christensen*, 802 F.2d 1539 (9th Cir. 1986) (en banc); *Moapa Band*, 747 F.2d at 565. In light of these considerations, we find plaintiffs' interpretation the most plausible, and hold that the district court had jurisdiction to review the EPA's suspension order.

II.

Subsection (c)(4) provides that an emergency suspension order shall be reviewable by the district court "solely to determine whether the order of suspension was arbitrary, capricious or an abuse of discretion, or whether the order was issued in accordance with procedures established by law." We review the district court's legal determinations de novo and its factual findings for clear error. *United States* v. *McConney*, 728 F.2d 1195, 1200-01 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). On the question whether an injunction was properly issued, once the facts and law are established, we review for abuse of discretion. *Colorado River Indian Tribes* v. *Town of Parker*, 776 F.2d 846, 849 (9th Cir. 1985).

A. As a preliminary matter, the EPA argues that the district court improperly considered evidence beyond the four corners of the administrative record. Generally, judicial review of agency action is limited to review of the record on which the administrative decision was based. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971). "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973), *quoted in Florida Power & Light Co.* v. *Lorion*,

470 U.S. 729, 743 (1985); *Friends of the Earth* v. *Hintz*, 800 F.2d 822, 828-29 (9th Cir. 1986).

We have recognized, however, certain exceptions to this general rule. The court may find it necessary to review additional material to explain the basis of the agency's action and the factors the agency considered. *Friends of the Earth*, 800 F.2d at 829; *Asarco, Inc.* v. *EPA*, 616 F.2d 1153, 1159-60 (9th Cir. 1980). Moreover, the court may consider, particularly in highly technical areas, substantive evidence going to the merits of the agency's action where such evidence is necessary as background to determine the sufficiency of the agency's consideration. *Asarco*, 616 F.2d at 1160. Nonetheless, the court may not weigh the evidence to determine the correctness or wisdom of the agency's decision. *Id.* at 1160-61.

The statutory scheme here strongly suggests that this is an appropriate case for consideration of matters outside of the administrative record. Subsection (c)(4) carefully apportions jurisdiction to review the EPA's suspension order between the courts of appeals and the district courts: "final order[s] on the question of suspension following a hearing shall be reviewable in accordance with section 136n [in the courts of appeals]." By contrast, emergency suspension orders, issued without the benefit of an agency hearing, are to be reviewed by the district courts. A fair implication is that, where no administrative hearing has been held, the district court—a court of first instance equipped to consider evidence—may look to matters outside the administrative record. Otherwise, it would have made little sense for Congress to give the district courts jurisdiction to review emergency orders; it might as well have left all agency review in the courts of appeals. *See* S. Rep. 970, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 4092, 4113 (bill vests jurisdiction over emergency orders in the district courts because, in the

absence of an administrative hearing, there would be no factual record for an appellate court to review).

We therefore conclude that the district court was well within its authority in considering evidence outside the administrative record. The evidence it considered was precisely of the type that it could properly take into account in determining whether the agency acted arbitrarily or in a manner inconsistent with the statute. Moreover, the district judge carefully limited the scope of the inquiry, noting that, "[i]n considering the evidence presented outside the administrative record, I did not question the scientific merit of the EPA's decision. . . . Instead, I was concerned that the EPA had not considered all relevant factors. . . . Dist. Ct. op. at 14.

First, the court heard testimony from two EPA officials: Dr. James Lamb, Special Assistant to Assistant Administrator for Pesticides and Toxic Substances; and Roger Holtorf, an economist with the Economics Analysis Branch of the Benefits and Use Division of the Office of Pesticides Programs. Holtorf, the principal EPA witness, was a team leader for the dinoseb cancellation proceedings and was involved in providing information on the economic consequences of dinoseb for the suspension hearing. 2 RT at 188, 190. The district court first carefully determined that Holtorf was intimately familiar with the evaluation process carried out by the EPA. *Id.* at 192-93. Holtorf then testified about the information considered by the EPA on the effects of suspension and the extent of its investigation and evaluation of these effects on plaintiffs' crops. In the district court's judgment, such evidence was necessary in light of plaintiffs' contention that the EPA's fact-finding procedures were inadequate. This testimony was properly admitted as evidence necessary to explain the basis for the agency action. *See Asarco*, 616 F.2d at 1159-60.

Second, the district court considered evidence developed or brought to the attention of the EPA after the issu-

ance of the suspension order, evidence pertaining to the relative efficacy of alternative pesticides in the Pacific Northwest and potential costs of the suspension. Much of this evidence was developed during plaintiffs' subpart D proceeding or in the course of the EPA's reconsideration as to other crops. *See* p. 1185 n.7 *supra*. The court reviewed the evidence not in order to judge whether the EPA properly weighed the costs and benefits, but only to determine whether it considered them at all. So limited, the court's consideration of evidence was entirely proper. *See Asarco*, 616 F.2d at 1160. We turn therefore to the merits of the district court's decision.

B. The EPA may only issue a suspension order if it determines that continued use of the pesticide during cancellation proceedings would pose an "imminent hazard." The statute defines that term as a situation where continued use "would be likely to result in unreasonable adverse effects on the environment or will involve unreasonable hazard to the survival of a species declared endangered or threatened. . . ." FIFRA § 2(1) (amended 1973), 7 U.S.C.A. § 136(1). In turn, "unreasonable adverse effects on the environment" means "any unreasonable risk to man or the environment, taking into account *the economic, social, and environmental costs and benefits of the use of any pesticide.*" FIFRA § 2(bb), 7 U.S.C.A. § 136(bb) (emphasis added). Before suspending all dinoseb registrations, the statute thus requires the EPA to consider the benefits as well as the risks of its use, including the economic consequences of suspension.[16]

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[16] As the court held in *Dow Chem. Co.* v. *Blum*, 469 F. Supp. 892, 902 (E.D. Mich. 1979), the EPA should examine: "(1) The seriousness of the threatened harm; (2) The immediacy of the threatened harm; (3) The probability that the threatened harm would result; (4) Benefits to the public of the continued use of the pesticides in question during the suspension process; and (5) The nature and extent of the information before the Administrator at the time he made his decision."

The EPA admitted in its October 14, 1986, Notice of Intent that "[f]or some . . . sites, such as green peas, snap beans, caneberries, and hops, the extent of economic impacts is uncertain." 51 Fed. Reg. at 36656. Based on this admission and other evidence, the district court found that "[b]ecause of the way in which the EPA gathered information, the impact of a ban on dinoseb on the northwest was treated in a cursory, unacceptable fashion." Dist. Ct. op. at 17. While concluding that dinoseb's potential dangers were properly substantiated, *id.* at 14, the district court held that "the EPA did not consider all relevant factors and, hence, made a clear error of judgment resulting in [a] findings that their entry of the emergency suspension order was arbitrary and capricious." *Id.* at 15.

After a careful review of the administrative record and the supplemental testimony before the district court, we must agree. The EPA's evaluation of the relevant factors under FIFRA was incomplete and rushed and, under the circumstances of this case, simply not adequate to justify the emergency suspension of plaintiffs' use of dinoseb.

First, the EPA gave itself insufficient time to comply with the statutory requirement that it balance risks and benefits. The EPA became especially concerned about the hazards of dinoseb in late June of 1986 when it received two studies from registrants indicating environmental risks. 1 RT at 144-45, 147. Around August 1, 1986, it ordered its Benefits and Use Division to prepare an evaluation of dinoseb, including production and usage information, a biological assessment and an economic impact assessment. 2 RT at 190, 193, 214. It established a September 1 deadline, which left what EPA economist Holtorf characterized as "a very short time frame." *Id.* at 190-91. The division was given only two weeks within which to evaluate nearly one hundred registered "sites," or crops, listed on dinoseb labels. 1 RT at 126; 2 RT

at 197. As Holtorf testified, "roughly a couple of weeks is about all total that we had to evaluate this; and the staff available for evaluation, they were fully employed with other projects." 2 RT at 207.

Given this tight schedule, the EPA personnel responsible for evaluating the benefits of dinoseb never quite got around to studying plaintiffs' crops. The agency's standard of methodology called for the staff to rank the various sites either by total acreage treated or by total pounds of dinoseb applied. With the information at hand, the EPA staff identified roughly 15 sites. 2 RT at 197. Starting with the largest crops, soybeans, peanuts and potatoes, the staff was supposed to work its way down the list until no other usages could be identified. *Id.* at 197, 206. However, by the sixth and seventh sites, green peas and snap beans (each of which accounted for approximately 2 percent of total dinoseb usage in the United States, *id.* at 197), the EPA had to stop because it ran out of staff and resources. As economist Holtorf testified, "we flat ran out of resources when we got about halfway down the list which would be roughly peas and beans. . . . We have a relatively small staff in relation to our work load, Your Honor. The Federal has been somewhat on a slide in terms of resources over the last few years." 2 RT at 206-07. The EPA thus never reached caneberries and cucurbits, which ranked below green peas and snap beans.

As a result of the incomplete study process, the district court found, the EPA used "scanty" data with respect to those crops, information "inconsistent with or contradicted by data readily available to, but not considered by, the EPA." Dist. Ct. op. at 17. For example, a principal document in the administrative record, relied upon by the decision-makers, was a study titled "Dinoseb: Summary of Biological and Economic Impacts of a Suspension/Cancellation." (EPA Aug. 1986) (Plaintiffs' Exh. 1) [hereinafter August Summary]; *see* Dist. Ct.

op. at 18. That document, dated August 1986 but attached to a cover memorandum dated September 2, 1986, was unfortunately both flawed and incomplete.[17] It was only a less detailed version of a May 1986 document that, by its own description, was "limited in scope . . . and should not be considered as a benefit analysis." Dinoseb: A Summary of Biological and Economic Effects 4 (EPA May 1986) (Plaintiffs' Exh. 62) [hereinafter May Summary]; *see* Dist. Ct. op. at 18. Although Holtorf testified that "there were telephone calls made to individuals at various Land Grant universities," he also stated that "[f]rom the time of the emergency suspension activity began until the document was prepared, there was no opportunity to gather additional outside information. . . ." 1 RT at 124.[18] The district court found that "[t]he September document was not updated." Dist. Ct. op. at 18.

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[17] For instance, it listed paraquat as an alternative for dinoseb as a desiccant on caneberries. But paraquat is not registered for "cane burning" and therefore may not be so applied. Letter from Mike Schwisow, State of Washington Department of Agriculture, to Donald R. Stubbs, EPA, at 2 (March 11, 1987) (Plaintiffs' Exh. 43); 1 RT at 118, 132; *see* p. 1205 *infra*.

[18] The EPA relied heavily on its own limited information. For example, it sought no information on alternative pesticides for green peas and snap beans from the public, 1 RT 124, 126; 2 RT at 205-06, but made some telephone calls and used some published usage reports and EPA-approved labeling information. 2 RT at 204-05. The chief of the Economic Analysis Branch of the Benefits Division summarized the extent of the EPA investigation in a memorandum to the chief of the Special Review Branch of the Registration Division:

> In the case of dinoseb suspension/cancellation, the analysis was conducted by EPA staff personnel. In other words, no analyses and significant data gathering activities were conducted by EPA cooperators, contractors, or other parties. The analysis was done on a quick turn-around basis based upon readily available data and information within the Agency.

Memorandum from Dr. Arnold L. Aspelin to Janet Auerbach at 1 (Sept. 29, 1986) (Plaintiffs' Exh. 65).

The paucity of the information in the possession of the EPA when it summarily suspended use of dinoseb in the Northwest is disturbingly revealed by this document. The report states at the outset that, although the Benefits Division usually considers information from "all possible data sources" during cancellation proceedings,

> due to the sensitive nature of suspension proceedings, outside resources were not used to estimate the current biological and economic impacts for either a suspension or a cancellation of dinoseb. While this impact analysis is the best that can be provided with current data limitations, it is possible that the impacts could change with new information from outside sources.

August Summary at 1-2.[19] The summary's findings are woefully incomplete. They note, for example, that "[w]ith other crops, such as caneberries and hops, there is uncertainty as to the extent of impacts because of substantial data gaps." *Id.* at 10. They go on to state that "[t]he overall impacts from a loss of dinoseb on green peas and snap beans are not as well defined [as those for potatoes and peanuts]. . . . Based on indications that the dinoseb alternatives may not be as effective, output losses are possible *but could not be accurately assessed with available data.*" *Id.* at 11-12 (emphasis added). The tables provided in the summary reveal starkly the EPA's uncertainty as to the economic impact of suspension on the crops grown by plaintiffs.[20]

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[19] The document does not disclose what it is about the proceedings that made them so sensitive that no outside parties could be consulted.

[20] Table 2 shows the "Significance of Economic Impacts" for the various sites. For snap beans the grower impact is listed as "minor," the consumer impact "uncertain." For green peas, the consumer impact is similarly "uncertain," but the grower impact conclusion of "minor" is footnoted with the following: "Grower impact expected to be $1.2M annually based only on a change in

In addition to limited data, the EPA conducted only a cursory evaluation of the availability of alternative pesticides and the consequent economic impact of suspension; it gave no particular attention to the Northwest at all.[21] Even though consideration of the comparative performance of the challenged pesticide and its alternatives is a standard part of the EPA's benefit analysis, 2 RT at 227, the May summary study stated that there had been no such analysis of dinoseb and its alternatives, and that as a result the authors could not estimate yield or revenue effects. May Summary at 7; 2 RT at 220.

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treatment costs. Yield losses may occur if alternatives are less effective in controlling black nightshade, however the extent is unknown." For berries, the consumer impact is once again "uncertain," and the grower impact is "minor," footnoted with the following: "Increase in treatment costs are expected to be approximately $78,000 annually. The significance of the economic impact could not be accurately assessed with available data." There is no specific listing for cucurbits.

In table 3, which sets forth the "Summary of Biological and Economic Impacts of Suspension/Cancellation of Dinoseb, by Site," the yield effect for snap beans is listed as "Unknown," the consumer effect "Uncertain." For green peas, the yield effects are "Possible; extent unknown," and the consumer price effect is "Possible; expected to be $> 1\%$," despite ignorance of expected losses. For caneberries, the yield effects and consumer price impact are respectively "Unknown" and "Uncertain." Once again, there is no specific listing for cucurbits.

[21] For example, the district court found as follows:

> [T]he record shows that telephone calls were made to knowledgeable people in the northwest, but no record of what was discovered by those calls was made.
>
> A minimal investigation would have revealed that the alternative sprays proposed were not viable alternatives in the northwest, although they were viable in other areas of the country where soil and other conditions differ. Defendant had no rebuttal to the conclusions of experts who testified that no viable alternative chemical sprays exist presently.

Dist. Ct. op. at 20.

Holtorf testified that the EPA never completed a "full efficacy evaluation" for peas and beans. 2 RT at 206. At the time of the suspension, the EPA was thus "very uncertain as to the levels of these alternatives" for dinoseb and "because of the uncertainties, [the EPA staff was] a little reluctant to estimate exact yield losses that could result." *Id.* at 207; *see also* 1 RT at 131-32. The EPA also had no evidence of what effect dinoseb suspension would have on caneberries and made no effort to find any. 1 RT at 133. As a result, although it had studied potatoes and peanuts in greater depth, the EPA was not able to evaluate the economic effects of dinoseb suspension on growers, regionally or nationally, "for some of the lesser used sites," including green peas and snap beans. 2 RT at 210.

In its own defense, the EPA argues that it ordered suspension on a nationwide basis, and was entitled to rely on nationwide findings as to alternatives and economic impact. For example, it found that only about a third of the nation's green pea acreage and 20 percent of the snap bean acreage was treated with dinoseb. 2 RT at 198-99, 201. It therefore extrapolated the costs of suspension likely to be suffered by pea and bean farmers in such states as Wisconsin to all parts of the country and concluded there "would be a minor effect on a national basis." 2 RT at 208 (green peas); *id.* at 209, 241 (snap beans). However, as the district court pointed out, there was no pressing need to enter an immediate nationwide ban on dinoseb: "The agency did have the power to suspend registration on a crop by crop and/or area by area basis." Dist. Ct. op. at 16. The suspension order was entered in October while the spraying season for the crops here at issue was not until the following March or April, some six months later. *See* Dinoseb: A Summary of Biological and Economic Impacts of an Emergency Suspension, table 1 (EPA Aug. 1986) (Plaintiffs' Exh. 63). The EPA therefore had ample

time to give the Northwest crops separate and careful attention.

There were good reasons for the EPA to have done so. At the time it entered the order suspending dinoseb nationally, the EPA was aware that the Pacific Northwest was subject to unusual conditions that made reliance on national figures tenuous, if not completly arbitrary. 2 RT at 209-10. For example, Northwest green pea farmers have to contend with black nightshade, a weed that produces a toxic berry about the same size as a pea. 1 RT at 43. The agency was aware that dinoseb was the only pesticide effective against nightshade. *See, e.g.*, Notice of Intent, 51 Fed. Reg. at 36657 ("[m]ost of the alternatives provide poor control of black nightshade"); May Summary at 7-8 & table 2; 2 RT at 220-21, 223. Without dinoseb, farmers would be unable to keep nightshade out of the pea harvest, and processors would reject the crops infested with the toxic berries. *See, e.g.*, Letter from W.H. Kosesan, Oregon Department of Agriculture, to Donald R. Stubbs, EPA, at 2 (Feb. 13, 1987) (Plainntiffs' Exh. 36); 1 RT at 14-15, 26, 43-44, 81-82; *see also* May Summary, table 2 ("[m]arginal producers with serious broadleaf e.g. nightshade, infestations may be forced out in a few years"). Although the EPA knew that nightshade posed some problem, it did not follow up on this issue, nor did it specifically evaluate the impact of suspension on the Northwest region. 1 RT at 131-32, 154; 2 RT at 209, 221-22.[22]

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[22] Holtorf testified to the EPA's disregard for the particular problems of Northwest farmers:

> There was certain information and indications in the information that nightside was a problem here; we so noted that problem. We recognized that as we typically do as to all pesticides that, as to certain areas of the country is more affected by [sic] others. But when you make a decision on a national basis—and that how the decision was made, on a national basis and not on a local basis.

2 RT at 208.

By extrapolating data from other regions, the EPA also did not consider, as it should have, the particular economic circumstances of farmers in the Pacific Northwest. For example, 95 percent of the commercial raspberry crop is grown in that region, and dinoseb is the only herbicide known to be effective as a chemical pruning agent in suppressing the primocane stage of raspberry growth; this "cane burning" increases crop yield and permits mechanical harvesting. Kosesan Letter at 3-4; Schwisow Letter (Plaintiffs' Exh. 43) at 4 (raspberry yield increases of 45 to 90 percent); 1 RT at 50-51, 116-17. The industry faces strong competition from Canadian producers across the Washington border, where dinoseb use is permitted. Without dinoseb, the entire American raspberry crop might prove unprofitable. *See* Schwisow Letter (Plaintiffs' Exh. 43) at 4; 1 RT at 90-91.

In addition, specific crop effects, such as the loss of various caneberries and the contamination of green peas by black nightshade, could have tremendous secondary effects in the Northwest, none of which the EPA considered. As the district court found, "[c]rop losses of this magnitude will result in business failures not only for farmers, but for the food processing industry as well." Dist. Ct. op. at 22. These losses were not included in the $39.2 million estimate, which covered only the losses to growers. *Id.* Plaintiffs presented testimony that food processors and other buyers come to the Northwest for the pea and bean crops, and then purchase a fuller line of vegetables while there. 1 RT at 86-87. Should the caneberry, pea or bean crops fail or prove unmarketable because of the suspension, the effects might ripple throughout the Northwest agricultural sector: Buyers would establish sources of supply elsewhere; processors might find it unprofitable to maintain plants in the region without those key crops; producers of other, ancillary, crops may be unable to sell their harvests as well. *See* Dist. Ct. op.

at 23. The effect of crop losses growing from discontinued use of dinoseb thus could seriously harm the entire regional economy.[23]

It may well be that, despite these dire economic effects, the suspension would be justified by the health risks to applicators and other farmworkers.[24] Without any investigation of those economic effects, however, the EPA could not do even a rough and ready balancing.

C. The EPA claims that the health risks were equivalent for all crops, and that the need to act decisively in removing dangerous pesticides from use justifies its less than exhaustive inquiry at the emergency suspension stage. *See Environmental Defense Fund, Inc. v. EPA*, 465 F.2d 528, 537 (D.C. Cir. 1972) (expedited hearing on imminent hazard "is to make a preliminary assessment of evidence, and probabilities, not an ultimate resolution of difficult issues"). Complete review of all uses, it claims, is the proper function of the full cancellation proceedings. *See Environmental Defense Fund, Inc. v.*

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[23] For example, the Washington State Department of Agriculture informed the EPA that "snap beans (along with other vegetable crops) is not an economically healthy industry and cannot afford another economic stress. The industry is dependent on dinoseb, and research efforts to find alternatives have not been permitted adequate time." Letter from Mike Schwisow to Donald R. Stubbs at 3 (March 11, 1987) (Plaintiffs' Exh. 41). *See also* Letter from Schwisow to Stubbs at 3 (March 11, 1987) (Plaintiffs' Exh. 42) ("[t]he Washington cucumber industry is not highly profitable, and the loss of dinoseb without some time to develop substitutes is a catastrophic blow to it"); *see generally* 1 RT at 86-87, 92-93; 2 RT at 257-62.

[24] In this regard we note, as did the district court, that "when the EPA obtained more information in hearings held in March, 1987, it modified the [suspension] order to allow the application of dinoseb to dry peas and lentils. There is no reasonable explanation why the crops at issue are treated differently. The application of dinoseb is frequently done by the same individuals and the risks affecting them are the same no matter what crops are being treated." Dist. Ct. op. at 21; *see e.g.*, 1 RT at 13-14.

EPA, 510 F.2d 1292, 1303 (D.C.Cir. 1975) ("[a] more careful exploration of the availability of alternatives for minor uses would be contemplated for the final determination on cancellation *vel non*"). Because the Pacific Northwest sites represented a relatively small percentage of dinoseb use nationally, the EPA contends that it was not required to prepare a full evaluation of economic consequences.

With all due respect to the EPA and its overworked staff, such insensitivity to the local economic problems caused by its decision is unbecoming and inappropriate. Crop losses of over $39 million may look like small potatoes from Washington, D.C., but, as the district court found, such losses would cause very serious economic hardships to the people of the Northwest who would have to bear them. There may well be very minor uses that are of economically trivial importance and therefore need not be separately studied before a suspension order is entered. *See, e.g., Environmental Defense Fund*, 510 F.2d at 1303 (challenged pesticide "is used on less than 5 percent of the total citrus acreage, and the ALJ noted that much of that use was a kind of 'just in case' insurance, applied even in the absence of knowledge that the pest exists in the pertinent grove"). The effects in the Northwest documented here surely do not fall into that category. As the district court noted:

> [S]everal processing plants are the principal payroll in small Washington and Oregon communities . . . . If these processing plants cease to operate because of business losses, community stability will be profoundly and adversely affected. The State of Oregon anticipates and proved a potential and severe impact on its economy if these losses disrupt the agricultural industry to the extent predicted.

Dist. Ct. op. at 23. There is ample support in the record for the district court's conclusion. *See* pp. 30-32 *supra*.

The EPA's inattention to the Northwest's special problems might nevertheless have been justified if there had been a genuine emergency that necessitated an immediate suspension of all dinoseb uses and foreclosed consideration of the problems faced by different regions of the country. However, the record does not document any particularly compelling circumstances requiring the EPA's haste. In order to issue a suspension order without notice and prior opportunity for a hearing, the EPA must find that there is an emergency that justifies immediate suspension. FIFRA § 6(c)(3), 7 U.S.C.A. § 136d(c)(3). The district court found that the principal basis for the "emergency" was the spraying of the potato crop in the early fall of 1986. *See* Dist. Ct. op. at 16.[25] By the time the EPA published the suspension order on October 14, 1986, however, the potato crop had already been treated with dinoseb.[26] Moreover, as noted, dinoseb use need not have been banned on a nationwide basis. *See id.* The EPA had another six months—until March or early April 1987—to study the situation of the Pacific Northwest. In the absence of an ongoing health hazard to create an emergency, giving the Benefits Division insufficient time and resources to evaluate the various crops appears to have been entirely arbitrary.

The Administrator estimated that it would take four months to complete a suspension hearing; Holtorf testified

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[25] *See also* Summary of Economic Impacts, Plaintiffs' Exh. 1, at 12 ("[t]he overall impacts of an Emergency Suspension would primarily be borne by potato growers"); Memorandum from Arnold L. Aspelin, Chief, Economic Analysis Branch, Benefits and Use Division, to Janet Auerbach, Chief, Special Review Branch, at 1 (Sept. 12, 1986) (Plaintiffs' Exh. 64) ("[t]he emergency suspension will have the greatest impact on potato growers who are yet to harvest later in the fall").

[26] *See* Dist. Ct. op. at 16; 2 RT at 229, 234; Aspelin Memorandum, Plaintiffs' Exh. 64, at 1 ("[w]e understand that most dinoseb usage for potato desiccation would be completed by October 1 or soon thereafter if there were no suspension").

that the economic impact evaluation and comparative performance review for the remaining crops would have been performed between September 1986 and March 1987. 2 RT at 235; *see* also 1 RT at 156 (Lamb testimony). The EPA, however, neither used that time to compile evidence justifying an emergency order, nor took advantage of the winter hiatus in dinoseb application to hold a suspension hearing. By suspending first and asking questions later—if at all—the EPA acted without due regard to the commands of FIFRA. We therefore agree with the district court that the emergency suspension order was arbitrary and capricious, an abuse of discretion ,and was not issued in accordance with the provisions of FIFRA.

III.

Having found the EPA's suspension order to be arbitrary, capricious and an abuse of discretion, we turn to the district court's grant of relief to plaintiffs. As noted above, the district court did not merely stay the suspension order. It handed down a five-page preliminary injunction permitting use of dinoseb on the crops at issue in Oregon, Washington and Idaho. The court specified the conditions for such use:

> 1. That dinoseb be sold (1) only to growers of green peas, snap beans, cucurbits, and caneberries in Oregon, Washington, and Idaho (2) in a quantity not to exceed that required to treat his acreage for each of those crops at the maximum application rates stated below. Dealers must maintain records of sales to growers.
>
> 2. Only certified applicators may use dinoseb; other persons, even if they are operating under the direct supervision of a certified application, may not use dinoseb.
>
> 3. Women of child-bearing age, i.e., under the age of 45, may not be involved in mixing, loading, or any aspect of dinoseb application.

4. A warning label must appear on the product specifying that (1) women of childbearing age may not use the product, (2) all reasonable efforts should be made to minimize indirect exposures to women of child-bearing age, (3) the product also poses risks to male reproduction, (4) is acutely toxic, and (5) the product may be applied only by certified applicators.

5. Aerial spraying is prohibited.

6. Mixing/loading of dinoseb is prohibited except from closed systems.

7. Ground application of dinoseb is prohibited except by the 'barrel sucker'/ground boom/tractor system.

8. Mixer/loaders and applicators must wear chemically resistant disposable coveralls (Tyvek suits) and chemically resistant gloves when mixing or loading dinoseb. Applicators or other personnel may remove such protective clothing immediately before entering the tractor cab to avoid cab contamination, but must carry an unused set of gloves and coveralls in their cabs, to be used in the event of spraying equipment malfunction and repair during application.

9. That maximum application rates for dinoseb be set as follows: 3 pounds ai/A for green peas, 4.5 pounds ai/a for snap beans, 4.5 pounds ai/a for cucurbits, and 2.5 pounds for caneberries.

10. That dinoseb be applied to a maximum of 80 acres per day per applicator.

Preliminary Injunction at 2-4. As to the spraying of green and dry peas, chickpeas, lentils, snap beans and cucurbits, the court added two "additional conditions":

11. Ground application is prohibited when wind conditions exceed ten miles per hour.

12. Tractor cabs must be closed and equipped with positive pressure ventilation systems.

Id. at 4. The court further specified that caneberries could only be sprayed during conditions that would "prevent any drift of the herbicide," and that "it may be applied by open tractors equipped as stated in paragraph 7 above, if operators wear chemically resistant disposable overall of the type specified above." *Id.* Last, the court ordered Oregon to enforce these conditions, and applied the order to the two other states if they agreed to enforce the conditions. *Id.* at 4-5.

Such a detailed and carefully crafted order—balancing the rights and interests of the affected parties—would normally be entirely appropriate for court sitting in equity.[27] However, the court is not free to use its full powers of equity because FIFRA strictly limits the remedy the district court may provide if it deems the EPA's emergency suspension order improper: "The effect of any order of the court *will be only to stay the effectiveness of the suspension order*, pending the Administrator's final decision with respect to cancellation or change in classification." FIFRA § 6(c)(4), 7 U.S.C.A. § 136d (c)(4)](emphasis added). Under the plain language of the statute, the district court could either let the suspension order stand or stay its effectivenes. The court was not empowered to craft an alternative suspension order. That task was reserved for the EPA.

[21] Because the court exercised its discretion under the mistaken impression that it could tailor an injunction so as to limit the pesticide's use, we cannot be sure that it would have been willing to allow the unrestricted

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[27] We note, however, that the intevenor unions have challenged the district court's order on equal protection grounds because it treats men and women differently. Because we disapprove the district court's order on statutory grounds, we need not consider this argument.

use of dinoseb. We therefore vacate the district court's injunction and remand for a redetermination of whether to stay the EPA's suspension order.

The EPA is not without recourse. If the district court does stay the suspension, and even if does not, the EPA may initiate an expedited suspension hearing in which plaintiffs and other interested parties may participate. Or, the EPA may itself modify its suspension order, much as it did with respect to dry peas and lentils, in response to the pending subpart D petition. The district court would, of course, take any such modification into account in deciding whether to issue the stay, or, once issued, in deciding whether to keep the stay in effect. *See* Fed. R. Civ. P. 60(b)(5)-(6); *Nicacio* v. *United States Immigration & Naturalization Serv.*, 797 F.2d 700, 706 (9th Cir. 1985) ("a court which issues an injunction retains jurisdiction to modify the terms of the injunction if a change in circumstances so requires"); 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2961, at 558-600 (1973). Thus, while the district court may, under FIFRA, suspend the EPA's order until completion of cancellation proceedings, this does not necessarily mean that dinoseb will be freely usable in the Northwest during that entire period. We leave these matters for the court and parties to sort out on remand.

CONCLUSION

We affirm the district court's ruling that the EPA order was arbitrary and capricious. We vacate its order staying the suspension, and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

NORRIS, Circuit Judge, dissenting:

Under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y, pesticides may not be distributed or sold unless they are registered with the Environmental Protection Agency (EPA). 7 U.S.C. § 136a(a). Section 6(b) authorizes the Administrator of the EPA to give notice of his intent to cancel the registration of a pesitcide

> [i]f it appears . . . that a pesticide or its labeling or other material required to be submitted does not comply with the provisions of [the] Act or when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment . . . .

7 U.S.C. § 136d(b).

In October 1986, the Administrator gave notice of his intent to cancel registration of products containing the pesticide dinoseb. Section 6(b) gives any person adversely affected by the notice the right to request a hearing on the proposed cancellation. If no hearing is requested, the cancellation becomes final after 30 days. 7 U.S.C. § 136d(b). In this case, six registrants [1] requested hearings on the proposed cancellation of 37 of the nearly 300 federal registrations of products affected by the cancellation notice. As provided in section 6(b), all other dinoseb registrations (approximately 260) were automatically cancelled 30 days after the notice was received. If, upon completion of the cancellation proceedings (which could take up to two years), the Administrator renders a final order cancelling the 37 dinoseb registrations still in effect, the order will be subject to judicial review under section 16(b). 7 U.S.C. § 136n(b).

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[1] A "registrant" is defined by the statute as "a person who has registered any pesticide pursuant to the provisions of [the] Act." 7 U.S.C. § 136(y).

In addition to giving the cancellation notice, the Administrator issued an emergency order immediately suspending the registration of all dinoseb products. He is authorized to do so if he determines that "action is necessary to prevent an imminent hazard during the time required for cancellation . . . proceedings. . . ," 7 U.S.C. § 136d(c)(1), and "that an emergency exists that does not permit him to hold a hearing before suspending [the registration]," 7 U.S.C. § 136d(c)(3). The question presented by this appeal is whether the district court had jurisdiction to review that emergency suspension order. As I read the statute, judicial review of the emergency order is foreclosed because of the failure of any registrant to request an expedited hearing on the question whether an imminent hazard exists.[2] The majority, on the other hand, holds that even in the absence of a request for an expedited hearing by a registrant, the district court had jurisdiction to review the order seven months after it became final under the statutory scheme. *See* maj. op at 1194.

The statute authorizes the Administrator to issue either an ordinary suspension order or an emergency suspension order if he determines that action is necessary to prevent "an imminent hazard during the time required for cancellation." 7 U.S.C. 136d(c)(1). The critical distinction is that an emergency suspension order goes into effect immediately, whereas an ordinary suspension order cannot go into effect until after an expedited hearing on the question of "imminent hazard," provided such a hearing is requested within five days after the Administrator gives notice of his intent to

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[2] Four registrants made timely requests for a hearing but later withdrew the requests. I agree with the majority that the withdrawal of the requests rendered them ineffective for statutory purposes: "It is quite obvious that the provision barring judicial review where no hearing is requested applies with equal force where a hearing is first requested and the request is then withdrawn." Maj. op. at 1190.

suspend a registration. 7 U.S.C. § 136d(c). If an expedited hearing is not requested, an ordinary suspension order becomes final under section 6(c)(2): "If no request for a hearing is submitted to the Agency within five days of the registrant's receipt of the notification provided for by paragraph (1), the suspension order may be issued and shall take effect and shall not be reviewable by a court." 7 U.S.C. § 136d(c)(2).

Section 6(c)(2) is explicitly made applicable to emergency suspension orders by section 6(c)(3). 7 U.S.C. § 136d(c)(3). Section 6(c)(3) states that when an emergency suspension order is issued, "paragraph (2) shall apply" subject to two exceptions which are not relevant to the question of whether an emergency suspension order is judicially reviewable in the absence of a timely request for an expedited hearing.[3] Thus on its face, section 6(c)(3), which authorizes emergency suspension orders, incorporates the language of section 6(c)(2) that a suspension order "shall not be reviewable by a court" if no request for an expedited hearing is submitted to the EPA within five days. 7 U.S.C. § 136d(c)(2). Thus, a suspension order, whether ordinary or emergency, is judicially reviewable *only if* a registrant makes a timely request for a hearing.[4] *Accord Nagel v. Thomas*, 666 F. Supp. 1002, 1006-07 (W.D. Mich. 1987).

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[3] These exceptions are as follows:

> (i) the order of suspension shall be in effect pending the expeditious completion of the remedies provided by [paragraph 2] and the issuance of a final order on suspension, and (ii) no party other than the registrant and the Agency shall participate except that any person adversely affected may file briefs . . . .

7 U.S.C. § 136d(c)(3).

[4] A final order on suspension following an expedited hearing is subject to judicial review as provided by section 16(b). 7 U.S.C. § 136n(b).

The majority nonetheless holds that an emergency suspension order is judicially reviewable even in the absence of a timely request for an expedited hearing. The majority concedes that judicial review of an ordinary suspension order is foreclosed when no hearing is requested. *See* maj. op. at 1187. But the majority gleans from the statute a distinction between ordinary and emergency suspension orders where none exists. As I understand the majority's analysis, the language of section 6(c)(3) that "paragraph (2) shall apply" in the case of an emergency suspension order was not intended by Congress to incorporate the first sentence of section 6(c)(2) which, is repeat, provides: "If no request for a hearing is submitted to the Agency within five days of the registrant's receipt of the notification provided for by paragraph (1), the suspension order may be issued and shall take effect and shall not be reviewable by a court." 7 U.S.C. § 136d(c)(2). The majority reasons that this sentence is not incorporated into section 6(c)(3) because "shall take effect" cannot apply to an emergency suspension order which is, by definition, already in effect. *See* maj. op. at 1192-1193. I find this to be a remarkably tortured and hypertechnical reading of the statute.

Congress made two explicit exceptions to the language in section 6(c)(3) which makes section 6(c)(2) applicable to emergency suspension orders. *See* 7 U.S.C. § 136d(c)(3)(i) and (ii). The majority effectively amends section 6(c)(3) to add a third exception as follows:

> [P]aragraph (2) shall apply except that (i) . . ., (ii) . . ., and (*iii*) the entire first sentence of paragraph (2) shall not apply.

The effect of this judicially created exception is that when the Administrator issues an emergency suspension order, the order *is* judicially reviewable even if no request for an expedited hearing is requested within five

days. This added exception is particularly odd because the language of the first exception, section 6(c)(3)(i), clearly refers to a portion of the first sentence of section 6(c)(2) without writing the entire sentence of of section 6(c)(3).

Furthermore, the majority suggests no reason why Congress would make a distinction between the judicial reviewability of ordinary and emergency suspension orders. I suggest none exists. For our purposes, the only relevant difference between the two orders is that an emergency suspension order takes effect immediately. If no request for an expedited hearing is received within five days, a suspension order, whether ordinary or emergency, becomes final, suspending the registration of a pesticide until completion of cancellation proceedings. 7 U.S.C. § 136d(c)(2). Thus, in the absence of a request for an expedited hearing, the two types of orders become functionally identical after five days. It simply defies common sense that an ordinary suspension order becomes final and unreviewable in the absence of a timely request for a hearing but an emergency order remains open and reviewable indefinitely. The majority reads into the statute congressional intent to authorize judicial review of the emergency suspension order seven months after it became final when an expedited hearing was not requested within five days. Yet the sole difference between an emergency suspension order and an ordinary suspension order in this case is simply this: Had the Administrator issued an ordinary suspension order rather than emergency suspension order, the order would not have gone into effect immediately but would have gone into effect five days later.

The majority's reliance on the language of section 6(c)(4) [5] is to no avail. There is only one plausible

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[5] Section 6(c)(4) provides in part:

> Any order of suspension entered prior to a hearing before the Administrator shall be subject to immediate review in an ac-

reading of section 6(c)(4): It provides that when an expedited hearing has been requested within five days, the registrant or an interested party (with the concurrence of a registrant) may seek judicial review of an emergency suspension order pending the outcome of an expedited hearing. Judicial review of an emergency suspension order is thus available under section 6(c)(4) only in the period of time after an expedited hearing has been requested but before the Administrator renders a final order on the issue of suspension, normally a matter of a few weeks.[6] *Accord Nagel*, 666 F. Supp. at 1007 (section 6(c)(4) " 'was not intended to open the door to judicial review indefinitely merely because the registrant waived its opportunity for a hearing' "); *Dow Chemical Co. v. Blum*, 469 F. Supp. 892, 899 (E.D. Mich. 1979).

Although I agree with the majority that an "order of suspension entered prior to a hearing" can only refer to an emergency suspension order, this language in section 6(c)(4) cannot possibly mean that Congress intended to permit judicial review of an emergency suspension order when an expedited hearing has not been requested. *See* maj. op. at 1191. There can be no such thing as an order pending an expedited hearing *unless* there has been a timely request for such a hearing within five days. In the absence of a timely request for an expedited hearing, the order becomes final, there is no expedited hearing, and the order is not "entered prior to a hearing." Thus

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> tion by the registrant or other interested person with the concurrence of the registraint in an appropriate district court . . . . This action may be maintained simultaneously with any administrative review proceeding under this section. . . .

7 U.S.C. § 136d(c)(4).

[6] The EPA has five days after receipt of a request to commence an expedited hearing and must render a final order within 17 days following the conclusion of the hearing. The expedited hearing may be held at a later time only if the registrant and the EPA agree. *See* 7 U.S.C. § 136d(c)(2).

an order can be an order "entered prior to a hearing" *only if* an expedited hearing is requested. Because an expedited hearing was never requested in this case, section 6(c)(4) simply does not apply. *Accord Nagel*, 666 F. Supp. at 1006-07; *Dow Chemical Co.*, 469 F. Supp. at 899 (judicial review of emergency suspension order under section 6(c)(4) prior to expedited hearing which had been requested by plaintiffs).

The bottom line in this case shows that the majority reading of the statute is bizarre. Contrary to the clear intent of Congress, which has written a statute which speaks in terms of suspension orders becoming final in *five days* if no registrant requests an expedited hearing, the majority allows non-registrants to seek judical review of an emergency suspension order *seven months* after it became final by the terms of the statute. The district court clearly lacked jurisdiction to review the emergency suspension order.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87-3866

D.C. No. CV 87-0343-JAR

JAMES M. LOVE;
NORTHWEST FOOD PROCESSORS ASSOCIATION;
TUALATIN VALLEY FRUIT MARKETING, INC.;
Plaintiffs-Appellees;

DAVE FROHNMAYER, Attorney General for the State of Oregon, on behalf of the people of the state of Oregon,
Intervenor-Appellee;

v.

LEE M. THOMAS, Administrator, United States Environmental Protection Agency,
Defendant-Appellant;

AMERICAN FEDERATION OF LABOR—CONGRESS OF INDUSTRIAL ORGANIZATIONS; NATURAL RESOURCES DEFENSE COUNCIL, INC.; UNITED FARMWORKERS OF WASHINGTON STATE; PINEROS Y CAMPESINOS UNIDOS DEL NOROESTE, INC.; CHRISTINA ESQUIVEL; DIANA GUZMAN; ALICIA PRIETO; AURORA LEON; ZENAIDA PRIETO; MARIA ESQUIVEL; CONSTANCIO MARTINEZ; JUAN PRIETO, JR.; ENRIQUE PRIETO; ANTONIO LEON;
Intervenors.

Appeal from the United States District Court for the District of Oregon
James A. Redden, District Judge, Presiding

Argued and Submitted
July 17, 1987—San Francisco, California

Filed January 29, 1988
Amended September 28, 1988

Before: William A. Norris, Alex Kozinski and David R. Thompson,* Circuit Judges.

Opinion by Judge Kozinski; Dissent by Judge Norris

John A. Bryson, United States Department of Justice, Washington, D.C., for the defendant-appellant.

Susan K. Eggum, McEwen, Gisvold, Rankin & Stewart, Portland, Oregon; Phillip D. Chadsey and Charles F. Adams, Stoel Rives Boley, Jones & Grey, Portland, Oregon, for the plaintiffs-appellees.

Arden J. Olson, Assistant Attorney General, State of Oregon, for the intervenor-appellee.

Albert H. Meyerhoff, Natural Resources Defense Council, Inc., San Francisco, California, for the intervenors.

ORDER

The panel has voted to amend its opinion by adding the following paragraph at the conclusion of Part II, 838 F.2d at 1074:

> Our conclusion in this regard is based on the circumstances of this case. Our holding should not be interpreted as suggesting that where human health is imminently threatened, the EPA may not lawfully issue an emergency suspension before considering the

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* Judge Thompson was drawn to replace Judge Anderson.

economic circumstances of every affected region. In this case, however, at the time the EPA entered its order, the agency had already received substantial information regarding a potentially disastrous and unique economic impact of its contemplated action on one affected geographic area. It issued the emergency suspension order without evaluating that impact, and then failed to use available time after entry of the order and before advent of the spring use season to evaluate the risks and benefits in the Pacific Northwest. Under those circumstances, the EPA acted arbitrarily and capriciously.

The majority of the panel has voted to deny appellant's petition for rehearing and to reject appellant's and intervenor's suggestions for rehearing en banc. Judge Norris would grant the petition for rehearing and accept the suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc, and no judge of the court has requested a vote thereon. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestions for rehearing en banc are rejected.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-3866

D.C. No. CV 87-0343-JAR

JAMES M. LOVE,
NORTHWEST FOOD PROCESSORS ASSOCIATION,
TUALATIN VALLEY FRUIT MARKETING, INC.,
Plaintiffs-Appellees,

DAVE FROHNMAYER, Attorney General for the
State of Oregon, on behalf of the
people of the state of Oregon,
Intervenor-Appellee,

v.

LEE M. THOMAS, Administrator,
United States Environmental Protection Agency,
Defendant-Appellant,

AMERICAN FEDERATION OF LABOR—CONGRESS OF INDUSTRIAL ORGANIZATIONS; NATURAL RESOURCES DEFENSE COUNCIL, INC.; UNITED FARMWORKERS OF WASHINGTON STATE; PINEROS Y CAMPESINOS UNIDOS DEL NOROESTE, INC.; CHRISTINA ESQUIVEL; DIANA GUZMAN; ALICIA PRIETO; AURORA LEON; ZENAIDA PRIETO; MARIA ESQUIVEL; CONSTANCIO MARTINEZ; JUAN PRIETO, JR.; ENRIQUE PRIETO; ANTONIO LEON;
Intervenors.

ORDER

[Filed Sept. 19, 1988]

Before: NORRIS, KOZINSKI and THOMPSON, Circuit Judges.

Appellant's motion to vacate the judgment on grounds of mootness is denied.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-3866

D.C. No. CV 87-0343-JAR

JAMES M. LOVE, *et al.*,
Plaintiffs-Appellees,

v.

LEE M. THOMAS, Administrator,
ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant.

AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), *et al.*,
Applicants-for-Intervention.

ORDER

[Filed July 14, 1987]

Before: ANDERSON, NORRIS, and KOZINSKI, Circuit Judges

The applicants' motion to intervene is hereby granted.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 87-343-RE

JAMES M. LOVE,
NORTHWEST FOOD PROCESSORS ASSOCIATION,
a non-profit association, and
TUALATIN VALLEY FRUIT MARKETING, INC.,
an Oregon corporation,
Plaintiffs,

v.

LEE M. THOMAS, Administrator,
Environmental Protection Agency,
Defendant.

[Filed May 21, 1987]

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OPINION

REDDEN, Judge:

Plaintiffs James M. Love, an Oregon farmer and packer, the Northwest Food Processors Association (NWFPA), a non-profit trade association of seventy fruit, vegetable and potato growers and processors in Oregon, Washington and Idaho, and Tualatin Valley Fruit Marketing, Inc. (TVFM), an Oregon corporation which grows and processes berry crops, move for a preliminary injunction under Fed. R. Civ. P. 65(a). They seek relief from an order of the Environmental Protection Agency (EPA) suspending the distribution, sale, or use of pesticides containing dinoseb (2-secbutyl-5, 6 dinitrophenol). They request a court order allowing the application of dinoseb to green pea, snap bean, cucurbit (cucumbers, squash and zucchini) and caneberry crops in the states of Oregon, Washington and Idaho.

The defendant is Lee M. Thomas, Administrator of the EPA.

The EPA issued the suspension order based on evidence that dinoseb may unreasonably endanger applicators of this pesticide by causing birth defects, lowered

male reproductive capability and possibly, death. The issue is whether that decision was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with procedures established by law. Plaintiffs claim the EPA did not properly weigh the risks as opposed to the benefits of the use of dinoseb, in that there are no alternative pesticides which can be used in the northwest.

This case was filed late Friday, April 3, 1987. The defendant was allowed until April 9, 1987 to brief its position. Trial commenced April 13 and concluded on April 14, 1987. An injunction and an expedited opinion were entered on April 15, 1987. That opinion promised a more thorough opinion to follow. This opinion incorporates much of the April 15 opinion, but adds sections on jurisdiction and the scope of review.

STATUTORY FRAMEWORK

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136, generally requires all pesticides to be registered for use with the EPA Administrator. However, the pesticide must meet the registration requirements set forth in 7 U.S.C. § 136a(c)(5), including a determination that it will not cause "unreasonable adverse effects on the environment." A continuous review of registered pesticides is required, to incorporate new information to protect human health and the environment. 7 U.S.C. § 136d.

In the event of new information that a registered pesticide poses a significant threat to human health or the environment, the Administrator may cancel the registration of that pesticide. 7 U.S.C. § 136d(b)(1). Depending on the severity of the hazard, the Administrator may (1) cancel the registration; (2) suspend the registration pending cancellation (ordinary suspension); or (3) suspend the registration immediately (emergency suspension). These three choices are necessary because of the varied risks of a pesticide depending on its nature

and use, and the amount of time consumed by cancellation or suspension proceedings during which a dangerous pesticide would otherwise continue to be used.

This case involves the third type of action, the emergency suspension.

Ordinary Suspensions and Expedited Hearings

If the Administrator determines a pesticide presents an imminent hazard, its registration may be suspended during the time required for cancellation. First, however, the Administrator must notify the registrant, or manufacturer, of the pesticide before issuing a suspension order. 7 U.S.C. § 136d(c)(1). The purpose of this notice is to provide for an expedited hearing, if the registrant requests it, on the question of whether an imminent hazard exists. *Id.* The order is effective after the expedited hearing, if one is requested. If no hearing is requested, the order is effective immediately. It is not reviewable by a court. 7 U.S.C. § 136d(c)(2). Five days are allowed after notice is received to request a hearing. After the passage of five days, the EPA may issue the order of suspension. *Id.*

A finding of imminent hazard results from a determination that the risks appear to outweigh the benefits of use of a pesticide during the cancellation proceedings. *Dow Chemical Co. v. Blum*, 469 F. Supp. 892, 898-899 (E.D. Mich. 1979).

Emergency Suspension

There is one exception to the requirement of notice to registrants before suspension of a pesticide registration. Whenever the Administrator determines an emergency is of such magnitude as to preclude an expedited hearing before suspension, he may issue a suspension order before he notifies the registrants. 7 U.S.C. § 136d(c)(3). The emergency suspension order is effective immediately. Notice to registrants is still required, and they may re-

quest an expedited hearing within five days after notice is received.

Participants in the Expedited Hearing

An ordinary suspension order requires notification of the registrant. 7 U.S.C. § 136d(e)(1). Only the registrant may request an expedited hearing. The only matter for consideration at the hearing is whether an imminent hazard exists. The expedited hearing must commence within five days after a registrant requests one, unless otherwise agreed. No one other than registrants may participate in this expedited hearing.

If an emergency suspension order is issued, the registrants must request an expedited hearing within five days after they receive notice of the suspension. Any person adversely effected by the emergency suspension may file briefs with the EPA. Anyone who files a brief is a party, and may obtain judicial review.

Judicial Review

7 U.S.C. § 136d(c)(4) provides that "a final order on the question of suspension following a hearing shall be reviewable in accordance with section 136n of this title . . ." 7 U.S.C. § 136n provides for review by a Court of Appeals.

However, if an emergency suspension is ordered before an expedited hearing, that order is subject to immediate review in a district court. Either the registrant or another interested person who has the concurrence of the registrant may bring this action. The only question for the court is whether the order of suspension was arbitrary, capricious or an abuse of discretion, or whether the order was issued in accordance with the procedures established by law. 7 U.S.C. § 136d(c)(4). Judicial review and administrative review of the suspension order may proceed simultaneously. *Id.*

FACTS

On October 7, 1986 the EPA issued an emergency suspension order pursuant to 7 U.S.C. § 136d(c)(3), without prior notice to registrants. The order prevented any further sale, distribution or use of pesticide products containing dinoseb. The required post-order notification to registrants was published in the Federal Register on October 14, 1986. 51 Fed. Reg. 36,634.

Four registrants requested an expedited hearing as provided for in 7 U.S.C. § 136d(c)(2) and (3). The hearing convened on October 20, 1986. Ten days later on October 30, 1986 all four registrants withdrew their requests for an expedited hearing and it was terminated. The EPA entered an immediate final suspension order as provided in 7 U.S.C. § 136d(c)(2) and (3). On November 26, 1986 the administrative law judge closed the docket in the expedited hearing.

Plaintiff Northwest Food Processors Association (NWFPA) petitioned the EPA for a subpart D hearing on February 11, 1987 to reconsider and modify the suspension order as provided for in 40 C.F.R. 164.130-133.[1] NWFPA contended dinoseb was the only truly efficacious pesticide for green peas, snap beans, caneberries and cucurbits, which was used successfully in the northwest for forty years. They claimed they would incur significant crop and financial losses if the order prohibiting dinoseb was not modified.

On April 1, 1987 the EPA denied the request to reconsider its order with respect to green peas and snap beans on the grounds that the petitioner had not "pre-

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[1] 40 C.F.R. §§ 164.130-133 allows interested parties to petition the EPA for a hearing after cancellation or suspension of a pesticide on whether the order should be reconsidered and modified. The petitioner must present substantial new evidence which would materially affect the order, which could not have been discovered with due diligence prior to the issuance of the final order.

sented substantial new evidence which may materially affect the prior suspension order." 52 Fed. Reg. 11,119 (April 7, 1987). With such a determination, the EPA is not required to hold a hearing. 40 C.F.R. § 164.131 (b). Such a decision is final. By April 15, 1987, the day the hearings ended in federal court, the EPA apparently had still not acted on the petition with respect to caneberries and cucurbits.

Earlier, however, the EPA had allowed modification of the order to permit the use of dinoseb under strictly monitored conditions to dry peas, lentils, and chick peas. On January 20, 1987 the American Dry Peas and Lentil Association petitioned the EPA for a Subpart D hearing on this issue. In mid-February, the EPA agreed to hold a hearing. The hearing concluded concluded on March 10, 1987 and the administrative law judge who presided recommended a modification of the suspension order to allow application of dinoseb on these crops. On March 30, 1987 the EPA approved the administrative law judge's recommendation.

Following the EPA's denial of the petition to modify the suspension order, plaintiffs filed on April 3, 1987 for a preliminary injunction in federal court. The EPA filed a motion to dismiss this action for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1). The EPA also filed a motion in limine to restrict this court's review to the administrative record, in the event the court finds it has jurisdiction. Both motions were denied.

DISCUSSION

Jurisdiction

The EPA contends plaintiffs erroneously base jurisdiction on section 10(a) of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706; the "federal question" provision of 28 U.S.C. § 1331; and on FIFRA, 7 U.S.C. §§ 136d(c)(4) and 136n(c).

I find that FIFRA provides this court with jurisdiction to review the EPA's emergency suspension order. 7 U.S.C. § 136d(c)(4) provides for judicial review. It states in relevant part:

> A final order on the question of suspension following a hearing shall be reviewable in accordance with section 136n of this title, notwithstanding the fact that any related cancellation proceedings have not been completed. . . . Any order of suspension entered prior to a hearing before the Administrator shall be subject to immediate review in an action by the registrant or other interested person with the concurrence of the registrant in an appropriate district court, solely to determine whether the order of suspension was arbitrary, capricious or an abuse of discretion, or whether the order was issued in accordance with the procedures established by law.

The EPA argues that the facts of this case should be viewed as if there were no requests for a hearing, since it ended prematurely upon the withdrawal of the registrants' requests for a hearing. If I find no requests occurred, the EPA contends 7 U.S.C. § 136d(c)(2) precludes court review. § 136d(c)(2) states in relevant part:

> If no request for a hearing is submitted to the Agency within five days of the registrant's receipt of the notification provided for by paragraph (1), the suspension order may be issued and shall take effect and shall not be reviewable by a court.

The EPA also cites *Dow Chemical v. Blum*, 469 F. Supp. 892, 899 (E.D. Mich.) for this proposition.

I decline to view the facts as if there were no requests for an expedited hearing. Factually such a conclusion is inaccurate insofar as four registrants requested a hearing. Nothing in the record indicates why these requests were withdrawn ten days into the hearing, to

justify a conclusion that no hearing took place. These registrants were concerned enough initially to attempt to challenge the finding that dinoseb presents an imminent hazard. Second, *Dow Chemical v. Blum* only cites § 136d(c)(2); it does not hold that an emergency suspension order cannot be reviewed by a court when a final order is entered after a partial expedited hearing terminates. Finally, I decline to foreclose the plaintiffs here from pursuing their rights as persons adversely affected by the order, as provided in 7 U.S.C. § 136d(c)(3). The record will reflect plaintiffs' contention that they were unaware of their right to file briefs, because their rights were not spelled out in the Federal Register notice of October 14, 1986. 51 Fed. Reg. 36,364 at 36,648. They are not entitled to letter notice from the EPA, as are the registrants, which heightens the need to notify them of their rights in the Federal Register. 40 C.F.R. § 164.120(a) and (b).

Alternatively, the EPA argues this court has no jurisdiction if it finds a hearing was held. In that case, it claims the emergency suspension order can be regarded as "a final order on the question of suspension following a hearing" which is reviewable exclusively in the Court of Appeals under § 136n. 7 U.S.C. § 136d(c)(4). Thus, the EPA would view the hearing as if it had been completed. However, both the statute and the legislative history make it apparent that Congress provided for review by the Court of Appeals following a hearing because the court would have a whole record to determine whether there was substantial evidence to support the order of the Administrator. *Environmental Defense Fund v. Costle*, 631 F.2d 922, 931-32 (D.C. Cir. 1980). I cannot conclude that the record from a ten day hearing was "whole" enough so that review could proceed as Congress intended. Further, these plaintiffs were foreclosed from obtaining judicial review in the Court of Appeals under § 136n because they had no notice of a right to file briefs,

which is a requirement to become parties for purposes of appellate review under § 136n. Consequently, it is not equitable to proceed as if a hearing was held.

I find this court has jurisdiction to review the emergency suspension order under 7 U.S.C. § 136d(c)(4). I specifically find an expedited hearing was requested, but was terminated prior to its conclusion, and therefore, the order of suspension was entered prior to a hearing. These plaintiffs were entitled to participate in that hearing by filing briefs, but were not notified of their right to do so.

The EPA argues that because § 136d(c)(4) provides for "immediate review," plaintiffs are foreclosed because they waited six months to pursue their right to judicial review. However, I find inadequate notice precluded plaintiffs from pursuing their rights in a more timely fashion, and that while Congress intended to ensure judicial review immediately following an emergency suspension order, it did not intend by that language to foreclose later review if merited. In fact, § 136d(c)(4) states that judicial review may be maintained simultaneously with any administrative review proceeding, which can take months. Plaintiffs filed this case immediately after the EPA notified them that their request for a modification was rejected.

Because I find FIFRA provides me with jurisdiction to review the emergency suspension order, I do not reach the issue of whether jurisdiction also exists under the APA or the "federal question" provision of 28 U.S.C. § 1331.

Pursuant to 7 U.S.C. § 136d(c)(4), I must decide whether the emergency suspension order banning dinoseb was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the procedures established by the law.

Scope of Review

Under the arbitrary and capricious standard, I must determine whether the EPA considered all relevant factors and whether it made a clear error of judgment. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). The inquiry made into the facts must be searching and careful, particularly in a highly technical case. The standard of review is narrow, however, in that this court cannot substitute its judgment for that of the EPA. *Id.* at 416. Despite the substantial latitude a court must give the EPA upon a review of its actions, especially where judgment and uncertainty are invoked with respect to an emergency suspension order, there are limits on the exercise of EPA emergency powers. The EPA's conclusions must be held to minimal standards of rationality. *Dow Chemical v. Blum*, 469 F. Supp. 892, 902-03 (E.D. Mich. 1979).

Court review of agency action is normally based on the full administrative record before the Administrator at the time he made his decision. *Overton Park*, 401 U.S. at 420. The EPA moved accordingly to restrict my review to the administrative record. That motion was denied. I determined that it was necessary to go outside the record to evaluate the EPA's actions properly, given the emergency nature of the situation before me, the highly technical nature of the subject matter, and potential deficiencies in the administrative record given the haste with which it was assembled to respond to the hearing on a preliminary injunction. Further, plaintiffs presented evidence that the EPA's fact-finding procedures were not adequate, and that the EPA subsequently had modified its order banning dinoseb with respect to some crops in the northwest during the process of administrative review. Therefore, oral and other evidence not in the administrative record was necessary for me to evaluate whether the EPA took into consideration all relevant factors. It was impossible to make such a de-

termination without going outside the record to determine what matters the agency should have considered but did not, and to discharge my duty to make a "substantial inquiry," rather than taking the EPA's word that it considered all relevant matters. *Asarco, Inc. v. U.S.E.P.A.*, 616 F.2d 1153, 1159-60 (9th Cir. 1980). In considering the evidence presented outside the administrative record, I did not question the scientific merit of the EPA's decision. All the evidence substantiating the risks of use of dinoseb appeared to be well-founded. Instead, I was concerned that the EPA had not considered all relevant factors, including a proper weighing of the benefits of dinoseb use, as opposed to the risks as required by 7 U.S.C. § 136(bb).

The Relevant Factors

After correctly determining the risks of the use of dinoseb, the EPA was then required to determine whether the benefits of use outweighed the risks. The EPA also must determine whether an emergency exists. To make this determination the EPA must determine whether there is a substantial likelihood that serious harm will be experienced during the three or four months required to complete the administrative suspension process.

It is necessary for the EPA to examine five factors in this process:

"(1) The seriousness of the threatened harm;

(2) The immediacy of the threatened harm;

(3) The probability that the threatened harm would result;

(4) Benefits to the public of the continued use of the pesticide in question during the suspension process; and

(5) The nature and extent of the information before the Administrator at the time he made his decision." *Dow Chemical v. Blum*, 469 F. Supp. at 902.

I find that the EPA did not consider all relevant factors and, hence, made a clear error of judgment resulting in my finding that their entry of the emergency suspension order was arbitrary and capricious. In making this determination, I relied extensively on the only case interpreting FIFRA's emergency suspension provisions, even though the issues are different. The reasoning in that case, *Dow Chemical v. Blum*, 469 F. Supp. 892 (1979), is sound. It provides a comprehensive framework in which to evaluate EPA actions with respect to emergency orders.

I specifically find the EPA did not consider the immediacy of the threatened harm, the benefits to the public of continued use of dinoseb during the suspension process, and the nature and extent of the information it had collected in order to determine if dinoseb should be banned immediately.

In the fall of 1986, the EPA concluded that there was immediate threatened harm in the northwest from applications of dinoseb. However, no dinoseb was to be used on northwest crops until late March or April of 1987, where it is used as a pre-emergent spray. The bulk of dinoseb is not used in the northwest, but is used in the fall in other areas of the country. The heaviest use of dinoseb is on potato and peanut crops, and this use was the EPA's major concern. The potato crop had already been treated by the time the EPA issued its emergency suspension order on October 14, 1986. Thus one area of most concern to the EPA in terms of immediate harm was not affected by its order. The agency did have the power to suspend registration on a crop by crop and/or area by area basis. Instead, they chose to approach the problem on a national level.

Because of the way in which the EPA gathered information, the impact of a ban on dinoseb on the northwest was treated in a cursory, unacceptable fashion. The key EPA witness testified at the hearing on April 14, 1987

that in gathering information with respect to the potential ban of dinoseb, the risks and benefits of its use on approximately fifteen sites had to be evaluated. The EPA branch responsible for evaluating the benefits was given only one month in which to prepare its analysis. To analyze the benefits, the EPA began with the largest crops using the greatest percentage of dinoseb. Unfortunately, due to budget constraints creating lack of staff and other resources, and the tight time schedule, the EPA stopped evaluating the benefits when it was at about the sixth or seventh site out of the total of fifteen sites.[2] What data it did use in analyzing dinoseb sites in the northwest was scanty, and inconsistent with or contradicted by data readily available to, but not considered by, the EPA.

In particular, the EPA did not determine the efficacy of alternative pesticides it proposed to substitute for dinoseb in the northwest. Consequently, the estimated financial impact to the northwest could not be determined accurately in weighing risks versus benefits. In considering alternative herbicides, the EPA referred to labels of various commercially produced chemicals and cited those claimed to be effective in dessicating specific weeds. EPA was aware of the fact that black nightshade, a prevalent and particularly harmful weed in the northwest, could be treated effectively only with dinoseb, but was not fully aware of the extent of the problem to assess adequately its devastating effect on the crops and economy of the area. Further, one chemical cited as an alternative could not be legally used on the crops the EPA proposed, because it is not registered for such use.

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[2] The notice of October 14, 1986 states:

> "For some other sites, such as green peas, snap beans, caneberries, and hops, the extent of economic impacts is uncertain."

51 Fed. Reg. 36.656. These are major crops in the Pacific Northwest.

One of the economic benefit studies prepared for the decision-makers, and relied upon, was a Summary of Biological and Economic Impacts of a Suspension/Cancellation for Dinoseb, dated September 2, 1986. Defendant's Exhibit 120. This document analyzed the economic benefits for the period of September 1986 to March of 1987. It was derived from a similar document prepared in May of 1986, which states it is "limited in scope and should not be considered as a benefit analysis." Defendant's Exhibit 12,p.1. The September document was not updated.

As a consequence of the lack of information gathered with respect to the northwest, the EPA's estimates of the economic harm nationally in dollar amount is but a small percentage of the actual economic harm to be inflicted on the northwest alone. The plaintiffs who grow crops claim a daily loss of $171,000 since April 1, 1987, and potential financial crop losses of $39.2 million this year. This estimate does not include the financial losses which the food processors will incur.

In determining whether to issue an emergency suspension order, the EPA must assess whether an "imminent hazard" exists. When notice is published of the order, the Administrator must include his findings on the question of whether an imminent hazard exists. 7 U.S.C. § 136d(c)(1). The term "imminent hazard" is defined to mean "a situation which exists when the continued use of a pesticide during the time required for cancellation proceedings would be likely to result in unreasonable adverse effects on the environment . . ." 7 U.S.C. § 136(1). The term "unreasonable adverse effects on the environment" is defined to mean "unreasonable risk to man or the environment *taking into account* the economic, social and environmental costs and *benefits*." 7 U.S.C. § 136(bb). *Dow Chemical Co. v. Blum*, 469 F. Supp. at 898, 899 (Emphasis added). The EPA was required by law to take into account the benefits of the use of dinoseb

as part of its procedure in determining whether an emergency suspension order was necessary. Because they neglected to gather essential and available data to determine the benefits on a national level, instead of just the sites involving the heaviest use of dinoseb, they did not follow the procedures required by 7 U.S.C. § 136(bb). Therefore, I find that the order of October 14, 1986 was not in accordance with the procedures established by law.

I do not hold that in such emergency actions the EPA must conduct a full scale and timely investigation or conduct complex studies or investigations to complete their balancing act, but I do hold that more than the perfunctory inquiry made here must be shown.

The final relevant factor the EPA had to consider in making its decision to ban dinoseb was the nature and extent of the information it had collected at the time the decision was made. In finding the Administrator's decision arbitrary and capricious, I have already noted the evaluation of benefits required by law was suspended because of lack of staff, time, and money. Further, the record shows that telephone calls were made to knowledgeable people in the northwest, but no record of what was discovered by those calls was made.

A minimal investigation would have revealed that the alternative sprays proposed were not viable alternatives in the northwest, although they were viable in other areas of the country where soil and other conditions differ. Defendant had no rebuttal to the conclusions of experts who testified that no viable alternative chemical sprays exist presently. This fact means massive crop failures and buyer rejection of northwest crops. It is significant that the growers have contracted to raise these crops and the processors have contracted to process and sell them.

It is also significant that when the EPA obtained more information in hearings held in March, 1987, it modified

the order to allow the application of dinoseb to dry peas and lentils. There is no reasonable explanation why the crops at issue are treated differently. The application of dinoseb is frequently done by the same individuals and the risks affecting them are the same no matter what crops are being treated. One witness testified that he raises both dry and green peas. He had just sprayed his dry peas with dinoseb, but could not legally spray his adjoining green pea crop. Had the nature and extent of information been different before the Administrator at the time he made his decision, this arbitrary treatment could have been avoided.

Preliminary Injunction

To obtain a preliminary injunction, plaintiff must show either: (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in its favor. *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985); *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1200-01 (9th Cir. 1980). These are not separate tests, but are at the ends of the continuum; the greater the relative hardship to the moving party, the less probability of success must be shown. *National Center for Immigration Rights, Inc. v. INS*, 743 F.2d 1365, 1369 (9th Cir. 1984). Under any formulation of the test, plaintiff must demonstrate that there exists a significant threat of irreparable injury. *Oakland Tribune*, 762 F.2d at 1376.

I find the plaintiffs will likely succeed on the merits or at the very least there are serious questions going to the merits and that the balance of hardships tips in plaintiffs' favor.

My reasoning on the merits phase has been set forth. Briefly, plaintiffs have sustained their burden of proof

by proving that the actions of EPA were arbitrary and capricious because of the failures and omissions noted earlier in this Opinion.

I also find irreparable harm. Plaintiffs' proof demonstrated that if the EPA's emergency suspension order is not enjoined, northwest agriculture will suffer crop losses conservatively estimated at $39.2 million. Losses are estimated at $171,000 per day during the spring planting season when dinoseb applications are prohibited. Those daily costs have occurred since April 1, 1987.

It is well established that monetary injuries due to lost income do not constitute irreparable harm. *Los Angeles Memorial Coliseum v. NFL*, 634 F.2d at 1202; *Regents of University of California v. ABC*, 747 F.2d 511 (9th Cir. 1984). However, I find other adverse effects will cause irreparable harm to the northwest. Crop losses of this magnitude will result in business failures not only for farmers, but for the food processing industry as well. Their estimated losses are not included in the $39.2 million estimated loss for growers. David Pahl, President of the Northwest Food Processors Association, testified that many of the 32 food processing companies in that association who process dinoseb-dependent crops generate 30 or more percent of their total sales volume from those crops. If dinoseb applications are not allowed at this time, these companies will lose their competitive edge in the market due to increased costs of production. Further, buyers who purchased dinoseb-dependent food products in the northwest will no longer purchase other food products from these processors because they will no longer be drawn to markets in the northwest.

In addition, several processing plants are the principal payroll in small Washington and Oregon communities, including Stayton, Woodburn and Milton-Freewater in Oregon and Mt. Vernon, Ferndale, Chehalis and Lynden in Washington. If these processing plants cease to oper-

ate because of business losses, community stability will be profoundly and adversely affected. The State of Oregon anticipates and proved a potential and severe impact on its economy if these losses disrupt the agricultural industry to the extent predicted.

Accordingly, I find that to the extent the public interest is a factor in balancing injury, irreparable harm will result if I do not grant the plaintiffs' motion for a preliminary injunction.

SUMMARY

After a review of the administrative record, other evidence in the form of affidavits and oral testimony and the law as it applies to this case I have concluded that plaintiffs should prevail. Accordingly I have entered an appropriate injunction.

In addition to this ruling I have denied defendant's motion to dismiss for lack of jurisdiction and defendant's motion in limine to restrict review to the administrative record.

I have declined to rule on plaintiffs' contention that I have jurisdiction pursuant to 28 U.S.C. § 1331 or § 10(a) of the Administrative Procedures Act, 5 U.S.C. § 702.

Dated this 22 day of May, 1987.

/s/ James A. Redden
JAMES A. REDDEN
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 87-343-RE

JAMES M. LOVE,
NORTHWEST FOOD PROCESSORS ASSOCIATION,
a non-profit association, and
TUALATIN VALLEY FRUIT MARKETING, INC.,
an Oregon corporation,
Plaintiffs,

and

DAVE FROHNMAYER, Attorney General for the
State of Oregon, on behalf of the
People of the State of Oregon,
Intervenor,

v.

LEE M. THOMAS, Administrator,
Environmental Protection Agency,
Defendant.

FINAL JUDGMENT

[Filed May 1, 1987]

Based on my Order of April 15, 1987, I find there is no just reason to delay entry of final judgment. Therefore, it is hereby

ADJUDGED that plaintiffs have final judgment against defendant Lee M. Thomas, Administrator, Environmental Protection Agency.

DATED this 1 day of May, 1987.

/s/ Honorable James A. Redden
HONORABLE JAMES A. REDDEN
United States District Court

Presented By:

MCEWEN, GISVOLD, RANKIN & STEWART

/s/ Susan K. Eggum
SUSAN K. EGGUM, OSB No. 82457
Of Attorneys for Plaintiffs

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civil No. 87-343-RE

JAMES M. LOVE,
NORTHWEST FOOD PROCESSORS ASSOCIATION,
a non-profit association, and
TUALATIN VALLEY FRUIT MARKETING, INC.,
an Oregon corporation,
Plaintiffs,

v.

LEE M. THOMAS, Administrator,
Environmental Protection Agency,
Defendant.

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

[Filed Apr. 15, 1987]

TO: Lee M. Thomas, Administrator, Environmental Protection Agency, Defendant

This matter came before the Court on April 13 and 14, 1987 for hearing on plaintiffs' motion for preliminary injunction against the defendant seeking relief from his suspension of the distribution, sale, or use of the pesticide dinoseb, (2-secbutyl-4,6-dinitrophenol), and permitting its use on green peas, snap beans, cucurbits (cucumbers, squash, and zucchini), and caneberry crops in the states of Oregon, Washington, and Idaho. The plaintiffs were represented by Susan K. Eggum, of McEwen, Gisvold, Rankin & Stewart, and Phillip D. Chadsey, of

Stoel, Rives, Boley, Fraser & Wyse, and the plaintiff-intervenor, State of Oregon, was represented by Special Assistant Attorney General Arden J. Olson. The defendant was represented by John A. Amodeo, United States Department of Justice, and Thomas Lee, Assistant United States Attorney.

Based on the record, including the administrative record related to the emergency suspension of dinoseb by the defendant on October 14, 1986 (Federal Register, Vol. 51, No. 198, page 36634), the Court finds that the defendant's action in suspending the use of dinoseb on the foregoing crops was arbitrary, capricious, and an abuse of discretion and further that the suspension order was not issued in accordance with the procedures established by law.

IT IS ORDERED that the effectiveness of defendant's Order of October 14, 1986 suspending the distribution and sale of dinoseb and its use on the foregoing crops is stayed pending the defendant's final decision with respect to any cancellation of dinoseb and that dinoseb may be used on those crops in the states of Oregon, Washington, and Idaho following the same conditions:

1. That dinoseb be sold (1) only to growers of green peas, snap beans, cucurbits, and caneberries in Oregon, Washington, and Idaho (2) in a quantity not to exceed that required to treat his acreage for each of those crops at the maximum rates stated below. Dealers must maintain records of sales to growers.

2. Only certified applicators may use dinoseb; other persons, even if they are operating under the direct supervision of a certified applicator, may not use dinoseb.

3. Women of child-bearing age, i.e., under the age of 45, may not be involved in mixing, loading, or any aspect of dinoseb application.

4. A warning label must appear on the product specifying that (1) women of childbearing age may not use the product, (2) all reasonable efforts should be made to minimize indirect exposures to women of child-bearing age, (3) the product also poses risks to male reproduction, (4) is acutely toxic, and (5) the product may be applied only by certified applicators.

5. Aerial spraying is prohibited.

6. Mixing/loading of dinoseb is prohibited except from closed systems.

7. Ground application of dinoseb is prohibited except by the 'barrel sucker'/ground boom/tractor system.

8. Mixer/loaders and applicators must wear chemically resistant disposable coveralls (Tyvek suits) and chemically resistant gloves when mixing or loading dinoseb. Applicators or other personnel may remove such protective clothing immediately before entering the tractor cab to avoid cab contamination, but must carry an unused set of gloves and coveralls in their cabs, to be used in the event of spraying equipment malfunction and repair during application.

9. That maximum application rates for dinoseb be set as follows: 3 pounds ai/A for green peas, 4.5 pounds ai/a for snap beans, 4.5 pounds (i/a for cucurbits, and 2.5 pounds for caneberries.

10. That dinoseb be applied to a maximum of 80 acres per day per applicator.

IT IS FURTHER ORDERED that spraying of green and dry peas, chickpeas, lentils, snap beans, and cucurbits shall be done only under the following additional conditions:

11. Ground application is prohibited when wind conditions exceed ten miles per hour.

12. Tractor cabs must be closed and equipped with positive pressure ventilation systems.

IT IS FURTHER ORDERED that the spraying of caneberries shall only occur during conditions which will prevent any drift of the herbicide; therefore, it may be applied by open tractors equipped as stated in paragraph 7 above, if operators wear chemically resistant disposable overalls of the type specified above.

IT IS FURTHER ORDERED that the State of Oregon will enforce the limitations on dinoseb use contained in this order by means of its existing procedures for certification of applicators and verification of compliance. This order will also apply to the states of Washington and Idaho on the condition that those states enforce the limitations of dinoseb use contained in this order.

DATED: April 15, 1987.

/s/ James A. Redden
HONORABLE JAMES A. REDDEN
United States District Court

(3)

Supreme Court, U.S.
FILED
MAR 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1255

In the Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, ET AL., PETITIONERS

v.

JAMES M. LOVE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

WILLIAM C. BRYSON
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QUESTION PRESENTED

Whether the users of an agricultural pesticide registered under the provisions of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136 *et seq.*, may obtain judicial review of an emergency suspension of the pesticide's federal registration even though the holders of the registration have withdrawn their administrative challenge to the emergency suspension.

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In the Supreme Court of the United States

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 838 F.2d 1059. The amended opinion of the court of appeals is reported at 858 F.2d 1347. The opinion of the district court (Pet. App. 47a-65a) is reported at 668 F. Supp. 1443.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 1988. Petitions for rehearing were denied on September 28, 1988. Pet. App. 42a-44a. On December 21, 1988, Justice O'Connor granted petitioners an extension of time to and including January 26, 1989, within which to file a petition for a writ of certiorari. The petition for a writ of certiorari was filed on January 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*, is the federal legislative scheme for regulating chemicals used as pesticides in the United States. The statute imposes restrictions on both the marketing and the use of products containing pesticides. Any person wishing to distribute or sell a pestieide must obtain a registration from the Environmental Protection Agency (EPA) for each product. 7 U.S.C. 136a(a).[1] EPA may limit the registration in different ways, such as restricting the pesticide to specific use or requiring that it be used only by applicators certified by EPA or state agencies. 7 U.S.C. 136a(d), 136b. The product label must bear those limitations, and it is a violation of FIFRA to use a pesticide contrary to the label restrictions. 7 U.S.C. 136j(a).

Under Section 6 of FIFRA, 7 U.S.C. 136d, EPA is authorized to initiate cancellation proceedings if it appears that the pesticide no longer meets the criterion that it not have "unreasonable adverse effects on the environment." The registrants, as well as other adversely affected persons, have the right to request an administrative adjudicatory hearing on the proposed cancellation and to obtain judicial review. 7 U.S.C. 136d(b).

Pending cancellation, EPA may take action to limit or prohibit the sale, distribution, or use of a pesticide. The Administrator of EPA may suspend the registrations to

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[1] Applicants must establish that the use of the pesticide will not cause "unreasonable adverse effects on the environment." 7 U.S.C. 136a(c)(5). That test requires EPA to weigh the risks of pesticide use against the benefits. The term "unreasonable adverse effects on the environment" is defined as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." 7 U.S.C. 136(bb).

prevent an "imminent hazard" if he concludes that the risks of continued use during the time it takes to complete cancellation proceedings would outweigh the benefits. 7 U.S.C. 136(*l*), 136d(c)(1). The registrants, but no other persons, can prevent the suspension from going into effect by requesting a hearing, which must be conducted on an expedited basis. 7 U.S.C. 136d(c)(2). Section 6(c)(2), however, expressly provides that, if no registrant requests a hearing on suspension, the suspension order "shall take effect and shall not be reviewable by a court." 7 U.S.C. 136d(c)(2).

In addition, the Administrator may determine that an "emergency" exists such that the suspension must take effect immediately. 7 U.S.C. 136d(c)(3). For that determination, the Administrator weighs the risks and benefits for the time period necessary to complete suspension proceedings. See *Dow Chemical Co.* v. *Blum,* 469 F. Supp. 892, 901-902 (E.D. Mich. 1979); 51 Fed. Reg. 36,635 (1986). In that case, the registrants have the same rights discussed above to a hearing on the suspension. The order, however, remains in effect during the suspension hearing, and the participation of parties other than the registrant is limited to the filing of briefs. 7 U.S.C. 136d(c)(3).

The statute also prescribes the conditions under which the Administrator's decisions regarding suspension are subject to judicial review. As noted, Section 6(c)(2) provides that when no hearing on the suspension is requested by the registrants the order "shall not be reviewable by a court." 7 U.S.C. 136d(c)(2). In addition, Section 6(c)(4) provides that a final order on suspension following a hearing is reviewable under Section 16, 7 U.S.C. 136n, the general provision for judicial review, and further that "[a]ny order of suspension entered prior to a hearing before the Administrator shall be subject to immediate

review in an action by the registrant or other interested person with the concurrence of the registrant in an appropriate district court." 7 U.S.C. 136d(c)(4).[2]

2. On October 7, 1986, the Administrator issued a notice of intent to cancel registrations for products containing the pesticide dinoseb, which was principally used to control broadleaf weeds in a variety of crops throughout the United States. See 51 Fed. Reg. 36,650 (1986). That action was based on new information indicating a substantial health risk to applicators and others exposed to the chemical.

At the same time, the Administrator also issued an emergency suspension for all uses of dinoseb. 51 Fed. Reg. 36,634 (1986). The agency concluded that further use of dinoseb would present a serious and immediate risk of irreversible birth defects in unborn children of pregnant females, adverse reproductive effects such as decreased fertility and sterility in exposed males, and acutely toxic reactions. 51 Fed. Reg. 36,636-36,637 (1986). On the basis of the limited information available to EPA regarding the economic benefits of continued use of dinoseb, the Administrator weighed the risks against the benefits and concluded that the continued sale, distribution, and use of dinoseb products would pose an imminent hazard during the time required to conduct a cancellation hearing. 51

[2] EPA has also established by regulation a process for seeking reconsideration of suspension orders that have become final pursuant to Section 6(c)(2) of FIFRA. 40 C.F.R. Pt. 164, Subpt. D. Parties applying for reconsideration under Subpart D must present substantial new evidence that may materially affect the prior suspension and that could not have been discovered, with the exercise of due diligence, before the suspension order. 40 C.F.R. 164.131(a). If a party's submission meets that threshold, EPA will conduct an adjudicatory hearing leading to a decision whether to modify the suspension for the benefit of those parties. The suspension order ordinarily remains in effect, however, pending the completion of that process.

Fed. Reg. 36,635-36,636 (1986). He further concluded that an emergency existed requiring the agency to suspend the sale, distribution, and use of dinoseb products during the pendency of any hearing on the question of imminent hazard. 51 Fed. Reg. 36,636 (1986).

The suspension affected registrations for some 300 products containing dinoseb. Although four registrants exercised their right to a hearing on the question of suspension during the pendency of cancellation proceedings, they withdrew those requests within two weeks, and on October 30, 1986, the suspension order became final pursuant to Section 6(c)(2) of FIFRA, 7 U.S.C. 136d(c)(2). Pet. App. 5a.[3]

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[3] Several registrants, however, requested a cancellation hearing; ultimately, that proceeding was settled without an evidentiary hearing when the registrants agreed to surrender their registrations and EPA agreed to allow transitional use of some of the remaining stocks of dinoseb products on certain crops grown in the Pacific Northwest. On June 10, 1988, that settlement was approved by the Administrator in a final order canceling the registrations. The Administrator's final order was attacked by the plaintiffs in this case (respondents here) in original actions brought simultaneously in the court of appeals and in the same district court that heard this case. Some of the petitioners here intervened in the district court action to challenge that portion of the order allowing use of existing stocks. The district court dismissed the action for lack of jurisdiction, and, in the alternative, concluded that the final cancellation order was valid in all respects. An appeal by the plaintiffs and a cross-appeal by the intervenors were consolidated for briefing and argument with the petition for review filed in the court of appeals presenting the same challenges. The court of appeals has recently issued an order, with opinion to follow, holding that jurisdiction over the petition for review lies in the court of appeals and affirming the action of the Administrator in its entirety. *Northwest Food Processors Ass'n* v. *Reilly*, Nos. 88-4339, 88-4389 (9th Cir. Mar. 20, 1989). Because respondents can still ask the Ninth Circuit or this Court to overturn the March 20 order, the present case is not moot. Cf. *FDIC* v. *Mallen*, 108 S. Ct. 1780, 1786 n.7 (1988).

3. Even though the suspension order became final on October 30, 1986, several months later—on April 3, 1987—a group of vegetable and fruit growers in the Pacific Northwest, who were dinoseb users but not registrants under the statute, brought suit to overturn the suspension insofar as it prevented them from using the pesticide on their crops. Pet. App. 6a-7a. They claimed that they were economically dependent on dinoseb because there was no practicable alternative and that measures could be taken to reduce the risk during the pendency of cancellation proceedings. Although the growers had invoked EPA's Subpart D procedures for relief from the suspension order (see note 2, *supra*) before seeking judicial review, their district court complaint sought review of the original suspension and not review of EPA's handling of the Subpart D request.[4]

After an expedited hearing, the district court enjoined the operation of the suspension as it applied to the grower respondents and imposed a set of restrictive conditions for the use of the pesticide. The district court concluded that it was authorized to review the suspension despite the waiver by the registrants of their administrative remedy. The

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[4] EPA handled the Subpart D request differently with respect to the different crops on which dinoseb was used. EPA denied the request with respect to green peas and snap beans on the ground that the growers' submission had not met the threshold test of new evidence that may materially affect the suspension. 52 Fed. Reg. 11,119 (1987). Based on a materially different evidentiary showing from the information presented by the plaintiffs here, EPA granted a hearing under Subpart D for growers of dry peas, lentils, and chickpeas in the Palouse region of Eastern Washington and Idaho. 52 Fed. Reg. 4963 (1987). EPA had not yet acted on the growers' request with respect to the use of dinoseb on caneberries and cucurbits (cucumbers, yellow squash, and zucchini) at the time the district court entered its injunction. That order completely superseded any relief the agency could have given under Subpart D.

court held that the limited opportunity for judicial review "prior to" an administrative hearing of an emergency suspension provided in Section 6(c)(4) applied to this situation because a hearing had been requested but was never held. Pet. App. 54a-56a. The court then concluded that the suspension order was arbitrary and capricious because EPA, at the time suspension was ordered, had minimal information regarding the benefits of continued use of dinoseb in the Pacific Northwest. *Id.* at 58a-63a. In reaching that conclusion, the district court admitted into evidence and relied on extensive material outside the administrative record of the suspension, much of which had been produced in the several months after that decision. *Id.* at 61a-65a.

The Administrator took an expedited appeal from the district court's judgment. The court of appeals permitted petitioners, individual farmworkers and their organizational representatives, to intervene in the case. A divided court of appeals affirmed in part and reversed in part.

The majority first rejected the district court's distinction between cases in which no request for a hearing was filed and instances in which such requests are later withdrawn. Pet. App. 11a. The majority, however, perceived a distinction between emergency suspension orders that never become the subject of an administrative hearing, and therefore are not formally superseded by further orders, and nonemergency suspension orders, which are initially published as proposed orders and formally superseded by final orders after a hearing or waiver of that right. *Id.* at 13a-14a. In the majority's view, the preclusion of judicial review contained in Section 6(c)(2) applies only to the latter class of suspensions because that subsection refers only to orders that had not yet issued and had not become effective. *Id.* at 14a. For that reason, the majority dismissed

that express language of Section 6(c)(3) that makes Section 6(c)(2), including the preclusion of judicial review, applicable to emergency suspensions. Thus, the majority concluded that emergency suspension orders that never become the subject of an administrative hearing remain subject to judicial review under Section 6(c)(4) until the Administrator issues a final decision on cancellation. *Id.* at 14a-15a. The majority also affirmed the district court's holding that EPA, in deciding whether to issue a nationwide emergency suspension, erred by failing to investigate local economic impacts that appeared to be minor on the nationwide scale. *Id.* at 19a-31a.[5]

Judge Norris dissented, maintaining that the majority's distinction between emergency and ordinary suspensions was a "tortured and hypertechnical reading of the statute." Pet. App. 38a. He concluded that there was "no reason why Congress would make a distinction between the judicial reviewability of ordinary and emergency suspension orders." *Id.* at 39a. Judge Norris noted that, when no hearing is requested on a suspension, the only difference between an ordinary and an emergency suspension is that the former becomes effective five days later than the latter. *Ibid.* In his view, there was no sensible reason to allow that distinction to become the basis for permitting judicial review of an emergency suspension many months after it had been issued and after the available administrative procedure for challenging it had been waived. *Ibid.*

Petitioners, intervenors below, have petitioned for a writ of certiorari on jurisdictional grounds. The Administrator of the Environmental Protection Agency is a respondent under this Court's Rule 19.6.

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[5] The panel vacated the injunction, however, on the ground that the statute gave the district court no equitable power to impose additional restrictions on the use of the pesticide. The district court could only issue a stay of the effect of the suspension. Pet. App. 33a.

ARGUMENT

We agree with petitioners that the decision below incorrectly reads FIFRA to provide for judicial review of emergency suspension orders when the registrants have requested but then abandoned an administrative hearing.[6] No other court of appeals, however, has considered the issue of the availability of judicial review in these circumstances. Furthermore, unlike petitioners, we do not think that this decision has resolved a federal question in a manner that conflicts with any decision of this Court because it rests on an analysis, however erroneous, of the specific statutory language of FIFRA. Finally, petitioners' fears concerning the impact of the decision on the exercise of the Administrator's emergency powers rest, at this point, on speculation about how the jurisdictional ruling of the court of appeals could influence future decisions. Although we acknowledge that the decision could possibly be a factor in those decisions, it will not have a uniform or predictable effect on future agency actions. Therefore, the petition for a writ of certiorari should be denied.

1. The court of appeals' construction of FIFRA's provisions for the suspension of pesticide registrations disregards the carefully crafted legislative reconciliation of the divergent interests of the public, the registrants, and the users of pesticide products. It is clear that Congress, in creating the administrative scheme for cancellation and suspension of pesticide registrations, intended to bar any judicial review of a suspension order that becomes final in the circumstances presented here. Indeed, the express language of FIFRA precludes review. Section 6(c)(2) provides that, when the registrant fails to request a hearing on

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[6] We also agree with petitioners that the court of appeals erred in setting aside the suspension on its merits, but petitioners have not sought review of the merits in this Court, nor have we. See Pet. 8 n.6.

the question of suspension, the order suspending the registration "shall take effect and shall not be reviewable by a court." 7 U.S.C. 136d(c)(2). There is no doubt that a proposed suspension order becomes effective, final, and unreviewable on five days' notice if the registrants fail to request a hearing. Thus, the essential precondition for an unreviewable order is the waiver by the registrant of its right to a hearing, and that condition was satisfied in this case.[7]

Nor is any different conclusion required because EPA exercised its Section 6(c)(3) authority and issued the suspension on an emergency basis. Section 6(c)(3) expressly states that "paragraph (2) shall apply" when the Administrator issues an emergency order. The reference to "paragraph (2)" is to Section 6(c)(2), which in turn provides that suspension orders become unreviewable when the registrants waive their right to a hearing. The court of appeals has dismissed Section 6(c)(3) on the unpersuasive ground that the first sentence of Section 6(c)(2) literally refers only to suspension orders that need to be issued in order to take effect, that is, ordinary suspension orders, and not emergency orders, which have been issued and have already taken effect. Pet. App. 14a.

That reading assumes that Congress, having written a provision for issuance of a notice of intention to suspend and having expressly provided for finality and *unreviewability* when registrants waive their opportunity to obtain administrative review (Section 6(c)(2)), reached the entirely opposite conclusion with respect to an emergency suspension in the next paragraph of the statute,

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[7] In this case, although a hearing was requested, the registrants withdrew the request shortly thereafter. The court of appeals quite correctly concluded that that situation should be treated no differently from the situation in which no request is ever filed. Pet. App. 11a, 36a n.2.

despite the express cross-reference to and incorporation of the previous paragraph. That assumption, we submit, is too implausible to be accepted without any indication that Congress intended that result. There simply is no such indication, and the decision below does not attempt to suggest any plausible reason for the distinction that could exist under this statutory scheme.

The court was drawn to its incongruous result by a need to reconcile Section 6(c)(3) and its incorporation of Section 6(c)(2) with Section 6(c)(4), which provides in part that "[a]ny order of suspension entered prior to a hearing before the Administrator shall be subject to immediate review in an action by the registrant or other interested person with the concurrence of the registrant in an appropriate district court." 7 U.S.C. 136d(c)(4). Section 6(c)(2) and Section 6(c)(4) can be reconciled, however, without abandoning the clear congressional intent to attach finality and unreviewability to suspension orders that are not subjected to further administrative consideration at the behest of registrants.

Section 6(c)(4) simply provides a limited opportunity for registrants or other interested parties to obtain court review of EPA's summary action while the issue of suspension is considered in a hearing. *Nagel* v. *Thomas,* 666 F. Supp. 1002, 1005-1006 (W.D. Mich. 1987); see *Dow Chemical Co.* v. *Blum,* 469 F. Supp. at 898, 901-902. The language of the provision makes that clear. First, review is available "prior to a hearing"; that necessarily implies that a hearing will be held. If no hearing will ever be held, as is the case here, then no review should be available. Second, what Section 6(c)(4) provides is "immediate review." That is a clear indication that judicial review is made available for the limited purpose of dealing with emergency situations pending a suspension hearing. To permit review

many months later violates that purpose and is unnecessary for the reconciliation of the various paragraphs of Section 6(c).[8]

Thus, the court of appeals has seriously misread the intent of Congress, rendering a decision that grants an additional remedy to nonregistrant users of a suspended pesticide. FIFRA, however, is a statute that Congress had repeatedly amended in an attempt to reconcile the various competing interests. See *Merrell* v. *Thomas,* 807 F.2d 776, 779 (9th Cir. 1986), cert. denied, 108 S. Ct. 145 (1987). Achieving an accommodation of the rights and interests of registrants and nonregistrants has been and remains a difficult and delicate task, which is complicated by the fact that registrants cannot be forced to manufacture and distribute any pesticide.

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[8] The court's reliance (Pet. App. 14a-15a) on the legislative history of Section 6(c)(4) is misplaced. The majority opinion notes that the bill reported by the Senate Agriculture and Forestry Committee authorized the district court to grant relief only through the termination of suspension proceedings, whereas the final bill authorized such relief until the conclusion of the cancellation proceedings. But Section 6(c)(4)'s reference to what relief the district court might provide does not address the question whether the court has authority to review the suspension order as an initial matter. Furthermore, the change was the product of a disagreement between the Senate Agriculture and Forestry Committee and the Senate Commerce Committee, and not the result of the conference between the House and the Senate. The history of the dispute between the two Senate committees does not provide a conclusive explanation of this provision, but the compromise appears to have arisen from a desire to avoid multiple actions for judicial review of successive suspension decisions while cancellation proceedings were pending. See S. Rep. No. 970, 92d Cong., 2d Sess. 28 (1972); S. Rep. No. 838 (Pt. II), 92 Cong., 2d Sess. 47-49, 69, 71 (1972). Nowhere in the committee reports is there any indication that Congress wished to preserve an opportunity for judicial review of a suspension order when the registrants had waived any right to have further administrative review.

Consequently, as the Fifth Circuit has held, the rights of nonregistrants must be limited to the express provisions of the statute. *McGill* v. *EPA*, 593 F.2d 631, 636-637 (1979). Contrary to the decision of the court of appeals here, the express provisions of the statute can be reconciled without adopting the glaring incongruity accepted by that court. Neither the plaintiffs nor the court of appeals majority has offered any conceivable reason why Congress, having provided that suspension orders become final and unreviewable in *five days* if registrants waive their hearing right, should be ascribed the intent to permit judicial review at the behest of nonregistrants *six months* after the order became final.

2. Despite the manifest error by the court of appeals, we do not join petitioners in suggesting that this Court review the jurisdictional ruling of the court below. Petitioners concede that the decision below does not conflict with any decision of another court of appeals, and, contrary to petitioners' suggestion (Pet. 25), the opinion does not resolve the question of the availability of judicial review in a way that is in conflict with any decision of this Court. We do not read the decision as rejecting the "balanced approach to statutory construction" required by *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 350 (1984), in assessing the availability of judicial review. We agree with petitioners that the court of appeals' construction of Section 6(c)(4) of FIFRA is implausible when viewed in the context of "the statutory scheme as a whole," *Block*, 467 U.S. at 349, and that the court failed to identify any coherent legislative purpose that could explain its construction. Nonetheless, whatever the deficiencies of the court's analysis, it is clear that the decision rests primarily on what the court thought was " 'fairly discernible in the statutory scheme.' " Pet. App. 15a (quoting *Block*, 467

U.S. at 350-351). Thus, there is no direct conflict with the general principles of *Block* and, because *Block* and this case involve the interpretation of two different (albeit very similar) statutes, there is no conflict in specific result either.

Finally, petitioners' assertions that the effect of the decision below will be "to inhibit the Agency from using its emergency powers at all" (Pet. 26) and that "this Court may not have another opportunity to restore the EPA's authority" (Pet. 11-12) are speculative and overstate the deterrent effect of this decision on future agency actions. The agency does acknowledge that this decision may be a factor in its deliberations when it weighs the advisability of emergency action in the future, but the effect of this decision will not necessarily be controlling in a particular instance.

The mere fact that the decision of the court of appeals will afford certain parties additional opportunities for judicial review of agency action is not, in and of itself, likely to have a significant effect on the agency's decision whether to take emergency action in a given instance. Rather, the effect of the decision on the agency's deliberations in a particular instance would likely be contingent on whether there are practical implications bearing directly on the agency's ability to abate the hazard in question through emergency action.

For example, the Administrator may decide that a case presenting particularly difficult scientific issues is best adjudicated in a single administrative forum (*i.e.*, a suspension hearing) rather than a multiplicity of district courts. The agency may also be concerned about its practical ability to administer and enforce an emergency order in a context in which interested parties are likely to use judicial review in order to prevent finality and create uncertainty.

The prospect that such practical concerns would materially influence a given decision, however, is wholly conjectural.

The practical import of the decision below in a given instance will depend on specific factual issues such as the nature of the hazard, the particular crops and regions involved, the timing of any proposed action in relation to those activities that may entail hazardous exposure, and the interests and inclinations of those parties who might be adversely affected by the proposed action. Thus, although it may not be implausible that the decision would sometimes have a chilling effect on the agency's willingness to issue an emergency order, the effect will not be uniform or pervasive, nor will it operate automatically to foreclose future review of the jurisdictional issue presented by this case. Given the novelty of the issue that the court of appeals decided and the speculative nature of any claim that the issue has special importance, the decision below—although clearly incorrect—does not require this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court

of the United States

OCTOBER TERM, 1988

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS; NATURAL RESOURCES DEFENSE COUNCIL, INC.; et al.,

Petitioners,

v.

JAMES M. LOVE, et al.,

DAVE FROHNMAYER, Attorney General for the State of Oregon,

and

JOHN A. MOORE, Acting Administrator, United States Environmental Protection Agency,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

1. Does Section 6(c) of the Federal Insecticide, Fungicide and Rodenticide Act, 7 USC § 136d(c), create jurisdiction in the district courts on an action brought by interested parties to enjoin an emergency suspension order?

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OPINIONS BELOW

Petitioner's statement is acceptable.

JURISDICTION

Petitioner's statement is acceptable.

STATUTES INVOLVED

Petitioner's statement is acceptable.

STATEMENT OF THE CASE

A. The Facts. Without prior notice, the EPA issued on October 7, 1986 an emergency suspension order for the registered pesticide dinoseb. The order required an immediate cessation of the use, transfer, and sale of dinoseb pending administrative proceedings to determine whether the pesticide posed a significant threat to human health and the environment. See 51 Fed Reg 36,634, 36,635 (1986).

The EPA was acting under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") which provides for the regulation of pesticide use in the United States. 7 USC § 136d(c).

Under FIFRA, pesticides may not be sold or distributed unless registered with the EPA. Registrants, who generally are manufacturers and users, must show that the product will not cause unreasonable adverse effects on the environment.

Pursuant to FIFRA, the EPA mailed copies of the emergency suspension order, already in effect, to registrants along with a notice of intent to permanently cancel all registrations. 40 CFR § 164.120(a), (b) (1988). Appendix to Petition. ("App" 55a). Post-order notification was also published in the Federal Register, informing registrants of their right to file for an expedited hearing to determine whether an imminent hazard existed.[1] 51 Fed Reg 36,634; 7 USC § 136d(c)(1).

Six registrants requested cancellation hearings pursuant to § 6(c)(2) of FIFRA. Four registrants

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[1] No notice was given that other interested persons might file briefs and participate in a judicial appeal. 7 USC § 136d(c)(3). App 15a.

contested the emergency suspension order by requesting an expedited hearing which began on October 20, 1986. Ten days into the hearing, the registrants withdrew their requests and the hearing was terminated. No explanation for the termination is cited in the record. (App 5a.) The EPA then entered a final suspension order continuing the ban and on November 26, 1986 the docket in the expedited hearing was closed. (App 52a.)

The American Dry Peas and Lentil Association petitioned the EPA for a hearing under 40 CFR § 164.130-133 to reconsider and modify the emergency suspension order. The Association sought modification to permit the use of dinoseb on dry peas, lentils, and chick peas under certain conditions. The EPA approved a recommendation of the Administrative Law Judge to allow the application of dinoseb on these crops on March 30, 1987. (App 53a.)

Two days later, however, the EPA denied a petition to reconsider the use of dinoseb on green peas and snap

beans.[2] The latter petition was submitted by the Northwest Food Processors Association ("NWFPA") on the basis that there would be significant crop and financial losses if the order were not modified. The EPA ruled that petitioner had presented no substantially new evidence, so that no hearing was required and the decision was final. 52 Fed Reg 11,119 (1987). 40 CFR § 164.131(b).

Two registrants continued to contest the final cancellation order in the Agency proceeding. On June 10, 1988, however, these registrants entered into a settlement agreement with the Administrator which provided for the sale and distribution of existing stock for use for 1988 to 1989, and for the final cancellation of the registration. See In the Matter of Cedar Chemical Company v. U.S. Environmental Protection Agency,

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[2] Chick peas and lentils are often grown in adjoining fields with green peas. Dry peas and green peas are essentially the same crop. (App 63a.)

FIFRA Docket Nos. 590, et seq., Cancellation Order and EPA Rationale for Settlement. Non-registrants were not parties to the settlement agreement.

B. The Proceedings in the District Court. Two days after EPA denied reconsideration, the NWFPA filed for a preliminary injunction in district court under Section 6(c)(4) of FIFRA.[3] The district court granted immediate review of the emergency suspension order, based on 7 USC § 136d(c)(4), and § 136d(c)(2).[4] (App 54a.) Concerning jurisdiction, the district court held

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[3] "Any order of suspension entered prior to a hearing before the Administrator shall be subject to immediate review in an action by the registrant or other interested person with the concurrence of the registrant in an appropriate district court, solely to determine whether the order of suspension was arbitrary, capricious or an abuse of discretion, or whether the order was issued in accordance with the procedures established by law." 7 USC § 136d(c)(4).

[4] The injunction permitted the use of dinoseb under prescribed conditions designed to protect applicators; there is no risk to consumers. 69a-71a; 7a n. 8.

that once the registrants had requested a hearing, this vested a right in others to seek district court review. That right of review was not divested by the registrants' termination of the hearing.

Following trial, the court preliminarily enjoined enforcement of EPA's emergency suspension order for dinoseb pending the completion of the EPA's cancellation proceeding. The district court also held that the actions of the EPA were arbitrary and capricious due to errors and omissions of the EPA. (App 64a.) The court found in particular that EPA had not considered the relevant factors in weighing risks and benefits. See Dow Chemical Co. v. Blum, 459 F Supp 892, 902 (ED Mich 1979). (App. 58a-App 62a.) EPA had instead analyzed the impact of the ban on the Northwest in a cursory, unacceptable fashion. (App 56a, 59a.) "What data it did use in analyzing dinoseb sites in the Northwest was scanty, and inconsistent with or contradicted by data readily available

to, but not considered by, the EPA." (App 60a.)

> "In particular, the EPA did not determine the efficacy of alternative pesticides it proposed to substitute for dinoseb in the northwest. Consequently, the estimated financial impact to the northwest could not be determined accurately in weighing risks versus benefits."

(App 60a.)

C. The Proceedings in the Court of Appeals. The Ninth Circuit affirmed that the EPA was arbitrary and capricious in issuing its emergency suspension. (App 31a, 34a.) The Ninth Circuit also affirmed jurisdiction in the district court, albeit on different grounds. Applying traditional rules of statutory interpretation and relying upon the long recognized presumption in favor of judicial review of administrative actions, the court held that an emergency suspension is judicially reviewable at the behest of a nonregistrant, whether or not a

registrant has first timely requested administrative review. (App 11a-16a.)

On the merits, the Ninth Circuit detailed EPA's failure to take into account economic, social, and environmental costs and benefits of the use of any pesticide before issuing a suspension order. (App 19a.) The Ninth Circuit also detailed EPA's recommended use of paraquat, a banned herbicide, and the lack of consideration given to the Northwest's unique problems with deadly nightshade. The court also found no genuine emergency to justify immediate suspension of dinoseb. (App 30a.) While EPA cited the fall potato crop of 1986 as the principal emergency, that crop had already been treated by the time the suspension order was issued on October 14, 1986. (App 3a.)

While the Ninth Circuit emphasized that the economic circumstances of every affected region need not be considered when human health is truly imminently threatened, the facts showed both no emergency and failure by

EPA to weigh risks and benefits. (App 43a-44a.) EPA's declaration of a public emergency when none existed nearly subjected Northwest agriculture and related enterprises to economic disaster. A timely injunction averted the harm.

REASONS WHY THE WRIT SHOULD BE DENIED

A threshold reason for denying certiorari is petitioners' lack of standing. The petitioners are all private entities or individuals. The EPA has not petitioned for certiorari. FIFRA neither permits citizen suits nor private attorney general actions brought on behalf of citizens. Fiedler v. Clark, 714 F2d 77 (9th Cir 1983). Additionally, none of these private entities or individuals has shown itself or him or herself to be within the class of persons which surrogate studies suggested might be at risk. It was undisputed that dinoseb is not hazardous to consumers. (CR 59, 162.) Moreover, while potential exposure of agricultural workers during reentry of fields treated with dinoseb was identified by the EPA as "a concern"

in its suspension decision, there was no objective finding of threatened or actual harm to such workers. It was instead findings of possible risk to applicators, based on surrogate studies, which EPA relied upon in ordering emergency suspension.

Intervenors' affidavits in support of their motion for intervention identify them (with three exceptions) as being or as representing persons other than chemical applicators. All but one of the individual intervenors state an interest only as harvesters.[5] Two of the four institutional intervenors also claim no interest on behalf of applicators. The AFL-CIO bases its standing on inclusion of "*** members who are exposed to dinoseb in its manufacture, processing, distribution, transport, sale

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[5] Intervenors Christina and Maria Esquivel, Alicia Prieto, Aurora Leon, Constancio Martinez, Enrique Prieto, Antonio Leon, Juan Prieto, and Juan Prieto, Jr., each testified to working in fruit or vegetable harvests. (Memorandum in Support of Motion to Intervene.)

and use, and potentially, through food." (Memorandum in Support of Intervention at 6 n.3.) The Natural Resources Defense Council (NRDC) bases its standing on "*** members *** exposed to dinoseb in their drinking water and food and which *** has an institutional and membership interest in protecting wildlife." (Id.)

It bears repeating that the EPA's suspension order was keyed to agency belief in studies suggesting harm to applicators. Of the three intervenors claiming an interest as applicators, intervenor Diana Guzman reports that "I have worked spraying pesticides in the past, though I was not told the names of the pesticides." (Motion for Intervention.) For the United Farmworkers of Washington, affiant Tomas Villanueva states: "Some of our members are also pesticide applicators in these crops." (Id.) For the Pineros y Campisenos Unidos del Noroeste, Inc., (PCUN), affiant Cipriano Ferrell declares that: "Within our membership we have individuals who have applied pesticides

to one or more of the covered crops." (Id.) No affiant has shown that he or she currently is licensed as a certified pesticide applicator.

Assuming for argument that petitioners have standing, their petition does not warrant grant of certiorari. In summary, petitioners seek to limit non-registrants' right to judicial review of emergency orders. Petitioners contend that review would deter the EPA from acting in emergencies.

In their push for plenary power for the EPA, petitioners contradict the express language of the statute, prior case law, and fundamental constitutional principles. FIFRA explicitly provides for judicial review to guard against abuse of discretion. 7 USC § 136d(c)(4). There is also a presumption, inherent in our system of checks and balances, which favors judicial review for administrative action. Block v. Community Nutrition Institute, 467 US 340, 350-51 104 S Ct 2450, 81 L Ed 2d 270 (1984); Dreyer v. Illinois, 187 US 71, 23 S Ct 28, 47 L Ed

79 (1902). Furthermore, the scheme the legislature has chosen, as construed by the Ninth Circuit, is consistent with basic principles of fundamental fairness and due process of law. Fuentes v. Shevin, 407 US 67, 92 S Ct 1983, 32 L Ed 2d 556 (1972).

While only administrative review is available for non-emergency orders, such orders cannot issue absent notice to registrants. 7 USC § 136d(c)(2). Emergency orders, by comparison, issue without prior notice of any kind. It is the lack of opportunity to be heard before issuance and lack of immediate effective notice which gives interested parties (with the concurrence of a registrant) the right to immediate district court review. 7 USC § 136d(C)(4). District Court review also precludes any question of a taking without due process that could arise if review were not allowed.

Petitioners insist that judicial review deters the EPA from acting decisively to protect public

health. (Petition, p 26.) Petitioners fail to recognize that the power to grant emergency suspension orders remains intact. All that EPA loses is the ability to act capriciously. Judicial review assures that the EPA will act with "minimal standards of rationality." Dow Chemical Co. v. Blum, 469 F Supp at 903.

Petitioners' assertion that emergency orders will be vulnerable assumes that EPA will not meet this minimum standard of rationality when it acts. Judicial review, however, may serve equally to validate an emergency suspension order when rational action is shown.

The Ninth Circuit's interpretation is not in conflict with other circuit courts. The Ninth Circuit's opinion is also consistent with general principles of law.

A. Statutory Scheme. FIFRA provides the EPA with three principal procedures to ban pesticides which present a threat to human health and the environment.

First, the EPA Administrator may give notice of intent to cancel the registration of a pesticide when there is a substantial question about the safety of the registered pesticide. Registrants receive prior notice of the proposed cancellation and may request a hearing to determine the sufficiency of the safety question before the cancellation takes place. Cancellation hearings may take two or more years to complete. Orders are reviewable by a court of appeals. 7 USC § 136n(b).

Second, if the Administrator determines that the pesticide presents an imminent hazard, the registration may be suspended pending the outcome of the cancellation proceedings. Except in emergency situations, the Administrator may not issue a suspension order until the registrants have been notified of the intended cancellation and of the findings in support of the considered imminent hazard. 7 USC § 136d(c)(2). Suspension orders issued after a hearing are also reviewable in a court of appeals. 7 USC

§ 136n(b). When notice of intent to suspend is issued the registrants must be given an opportunity to request an expedited hearing on whether an imminent hazard is present. The registrant has five days after the receipt of the notice to request the hearing. Following a request for hearing, the suspension is automatically stayed until after the matter both has been heard by an Administrative Law Judge and the Administrator has issued a final order after reviewing the law judge's findings. If no request for a hearing is made within five days of the registrants' receipt of the notice, the suspension order may issue and will not be judicially reviewable. 7 USC § 136d(c)(2).

Third and finally, in extraordinary circumstances, the EPA may issue without notice an emergency suspension order. 7 USC § 136d(c)(3). Such an order goes into effect immediately and remains in effect pending the result of an expedited hearing. 7

USC § 136d(c)(3). Only registrants may request and participate in the hearing although any person adversely affected may file a brief and become a party for purposes of review. 7 USC 136d(c)(3). Once an emergency suspension order has been entered, it is subject to immediate review in an action brought in district court by the registrant or other interested persons with the concurrence of the registrant.[6] 7 USC § 136d(c)(4).

The statutory scheme plainly allows for two lines of review, judicial and administrative. The statute provides access to both processes for registrants and non-registrants (with the concurrence of registrants) with varying degrees of participation according to their interests and to the type of suspension order at issue. 7 USC § 136d(c)(3). Section 4 specifically allows judicial review before cancellation proceedings

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[6] Petitioners contend that district court review should become available only after a complete administrative hearing on the propriety of the underlying suspension. (Petition, p. 15.)

have been completed. It further provides review to occur simultaneously with other administrative review proceedings provided for under § 6(c). 7 USC § 136(d)(c)(4). The provision that an emergency suspension order is subject to immediate review before the completion of any administrative review is entirely consistent with the procedural scheme of Section 4.

B. Statutory Structure and Purpose. There is no dispute that FIFRA delegates executive power to the EPA to protect public safety through the regulation of pesticides. The issue is whether the legislature intended to provide judicial review of emergency suspension orders in actions brought by non-registrants. Petitioners' contention that the agency is the only body with the proper expertise to review these technical matters ignores the question of legislative intent.

The lack of notice and immediate effect of emergency orders may reasonably result in the right of

judicial review to a broader group of interested parties. The rights of review that apply to emergency orders are not dependent upon the rights that apply to ordinary suspension orders which are issued only after notice and an opportunity to be heard is given to those that the legislature has determined have the greatest interest in the suspension.

The right to judicial review is not extinguished for registrants when no request for an expedited hearing is made. The extraordinary act of emergency suspension merits access to direct judicial review in the eyes of the legislature.[7] The exhaustion of

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[7] The Ninth Circuit explained:

> "FIFRA, however, provides for the issuance of a final suspension order only in those cases where there is an administrative hearing. There is no provision for entering a separate final suspension order if no hearing is held after issuance of an emergency order, and none in fact was entered in this case. The EPA invites us to create a procedural fiction

administrative remedies is specifically not required on the face of the statute. FIFRA § 6(c)(4), 7 USC § 136d(c)(4).

Petitioners present the extraordinary notion that there is an "evident [legislative] intent to preclude non-registrants from interfering with the short-term suspension of a pesticide." (Petition, p 19.) Petitioners may be correct in stating that non-registrants are restricted from access to administrative review of suspension orders due to the short duration of the orders and the burden on the agency in conducting hearings. Id. at 18. However, the express provision for

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to the effect that a final suspension order follows an emergency order whenever a hearing is waived. We see no reason for doing so. As we read the statute, when no hearing is held, the emergency suspension order simply stays in effect until the cancellation or classification proceedings are completed, or, as in this case, until stayed by the district court." (App 13a.)

judicial review of emergency orders by non-registrants eases the administrative burden, provides for checks and balances, and guards against agency abuse of discretion. The statute is not designed to preclude non-registrants from asserting their express rights as interested parties.

Petitioners' advocacy of plenary power for the EPA to both declare and adjudicate whether an emergency exists is inconsistent with case law and the language of the statute. 7 USC § 136d(c)(3), and (4); see Dow Chemical Co. v. Blum, 469 F Supp at 902. Petitioners presume that a registrant's failure to proceed with an expedited hearing can only be based on a belief the registrant cannot prevail.

Finally, petitioners consider this case to be one which supports "foreclosing hasty judicial review" for emergency suspension orders. (Petition, p 20.) Petitioners assert that the Court of Appeals did not question the Administrator's conclusion as to the

hazard presented by dinoseb. Id. The Court, however, clearly did not find any imminent threat and did find the record failed to show any "particularly compelling circumstances requiring the EPA's haste." (App 30a.)

The Ninth Circuit re-emphasized the circumstances of this case in its Amended Opinion:

> "Our conclusion in this regard is based on the circumstances of this case. Our holding should not be interpreted as suggesting that where human health is imminently threatened, the EPA may not lawfully issue an emergency suspension before considering the economic circumstances of every affected region. In this case, however, at the time the EPA entered its order, the agency had already received substantial information regarding a potentially disastrous and unique economic impact of its contemplated action on one affected geographic area. It issued the emergency suspension order without evaluating that impact, and then failed to use available time after entry of the order and before advent of the spring use season to

> evaluate the risks and benefits in the Pacific Northwest. Under those circumstances, the EPA acted arbitrarily and capriciously." (App 43a-44a.)

C. Statutory Language. The express language of the statute supports the Ninth Circuit's holding that a district court has jurisdiction to review an emergency suspension order brought in an action by a non-registrant. Petitioners ignore the plain, though ungainly, language of Section 6(c)(4). This section states: "Any order of suspension entered prior to a hearing before the Administrator shall be subject to immediate review in an action by the registrant or other interested person with the concurrence of the registrant in an appropriate district court ***." 7 USC § 136d(c)(4) (emphasis added).

The conclusion reached by the Ninth Circuit is inescapable when the critical sentence in Section 4 is parsed. The phrase "Any order of suspension entered prior to a hearing" can only refer to an emergency suspension order.

An ordinary suspension order is not entered "prior to a hearing." A notice is issued prior to a hearing for ordinary suspension. If no request for a hearing is received, then the suspension order is issued, but pursuant to Section 6(c)(2), the suspension order is not reviewable by a court.[8] 7 USC § 136d(c)(2). Therefore, immediate review in district court is available for emergency suspension orders in actions brought by the registrant or other interested persons. (App 13a.)

Petitioners contend that Section 2 precludes judicial review of an emergency suspension hearing in the absence of a timely request for an expedited hearing. Section 2, however,

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[8] The Ninth Circuit summarized:

> "Since ordinary orders entered after waiver of a hearing are made unreviewable under subsection (c)(2), subsection (c)(4) must authorize district courts to review emergency suspension orders, if it is to have any meaning at all." (App 12a.)

immediately follows and refers to the section on ordinary suspension orders. Section 2 states that if there is no request for an expedited hearing within five days of the registrant's receipt of notification, then the suspension order may be issued and shall take effect. Furthermore, the order shall not be reviewable by a court. 7 USC § 136d(c)(2).

The five-day provision clearly cannot refer to an emergency suspension order for two reasons. First, receipt of notification occurs after the issuance of an emergency suspension order, not before as this section contemplates. Second, an emergency order becomes effective immediately, prior to a request for a hearing, not afterwards, as is contemplated here.

Petitioners' interpretation of this sentence is as implausible as it is incomprehensible. The suggestion is that the three clauses, "shall issue," "shall take effect" and "shall not be reviewable," which are joined

conjunctively, should be read so as to make two clauses inapplicable and one clause applicable to FIFRA § 6(c)(3). (Petition, p 23.)

The statute provides that an emergency suspension order shall be "subject to immediate review." § 6(c)(4), 7 USC § 136d(c)(4). The Ninth Circuit found that NWPFA's suit was timely in that the non-registrants filed immediately after they had received a denial from the EPA on their motion to reconsider the suspension. Petitioners, however, contend that because the non-registrants filed in district court several months after the order was actually imposed, the suit is not timely. Clearly, the NWFPA filed immediately after exhausting their own administrative remedies.

The context of the section makes the meaning of the phrase "subject to immediate review" quite clear. It does not mean that "review must be 'immediate.'" (Petition, p 21.) The previous sentence provides that review

may be sought even if cancellation proceedings have not been completed. FIFRA § 6(c)(4), 7 USC § 136d(c)(4). The following sentences provide that judicial review may be sought simultaneously with expedited hearings, and that judicial review shall not operate as a stay. Id. The legislative intent was clearly to allow a suit to be filed in district court to enjoin emergency suspension orders notwithstanding ongoing related administrative proceedings.

The Ninth Circuit has not rendered a decision in conflict with any decision of another federal court of appeals on the same matter. SCR 17.1.(a). The Ninth Circuit has not departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court so as to call for an exercise of this Court's power of supervision. SCR 17.1.(a). The Ninth Circuit followed established judicial principles by looking to the plain meaning of the statute, construing the statute to avoid

redundancy, surplusage or constitutional conflict, and by adhering to the established principle of providing for judicial review of administrative action. Petitioners merely advocate plenary power to the EPA. There is simply no conflict in the law that makes this case appropriate for granting a writ of certiorari.

The statutory construction rendered by the Ninth Circuit does not leave the intent and meaning of the statute in a state of confusion so as to require further clarification by this Court. Furthermore, the argument that the Ninth Circuit's decision unreasonably restricts the Agency's ability to issue emergency suspensions was specifically addressed in its amended opinion. That amendment resolves whatever doubts may linger as to whether the Ninth Circuit's ruling in any way inhibits the EPA's power to protect human health in a true emergency.

CONCLUSION

For the reasons stated above, this Court should deny certiorari.*

Respectfully submitted,

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* While on March 20, 1989 the Ninth Circuit sustained EPA cancellation of dinoseb pursuant to a settlement, Northwest Food Processors Association v. Reilly, 9th Cir Ct of Aps 88-4339, 88-4389, that ruling has no effect on the reviewability of the emergency suspension order.

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No. 88-1255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, *et al.*

v.

JAMES M. LOVE, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

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1. Normally the Government's briefs to this Court sound with the sweet music of legal reason. That is not so of the Federal respondent's brief in opposition here; its dissonance reveals the unresolved tension between two discordant voices.

The dominant voice is that of the Justice Department and it shows a blithe, and most unbecoming, disregard for effective enforcement of the Federal environmental laws according to their terms, and for public health and safety. Subordinated in the background is the dying echo of the Environmental Protection Agency's ("EPA")[1] concern

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[1] The EPA is, in theory, the Justice Department's client and, in fact, the Agency designated by Congress to administer FIFRA.

that the decision below is not simply wrong, but wrong in a way that undermines EPA's long-term ability to meet public health emergencies.

As one would expect, and as we now show, the result is that the Government's attempt to develop its theme that the *certiorari* petition here should be denied does not ring true.

1. In contrast to the private respondents (hereafter, for simplicity's sake, "Love"),[2] the Government agrees that

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[2] On the merits, Love defends the Ninth Circuit decision primarily by answering a different question than the one that is in fact involved in this case: Love labors to prove that the statute generally permits review of emergency suspension orders (e.g., Response to a Petition for a Writ of Certiorari ("Response") at 12, 17-18, 23-24); but there is no dispute that where suspension proceedings are pending before the agency, emergency suspension orders *are* reviewable in court. Rather, the issue here is whether emergency suspension orders *remain* reviewable although available administrative proceedings for considering the propriety of those orders are not used. Love offers no explanation why Congress would wish to provide special review proceedings for emergency suspension orders even *after* there has been notice and an apportunity for an agency hearing with regard to such orders, and the distinction between emergency and ordinary suspension orders therefore no longer exists.

Love also suggests that petitioners lack standing to file a petition for writ of certiorari. Response at 9-12. However, as Love indicates, at least one of the individual and two of the organizational plaintiffs do represent the interests of applicators on the crops and in the area involved in this case. Response at 11-12. Moreover, the EPA order banning dinoseb relied in large part on harm to farmworkers other than applicators and their families. Decision and Emergency Order Suspending the Registrations of all Pesticide Products Containing Dinoseb, 51 Fed. Reg. 36,634, 36,643 (there is a substantial risk of birth defects in the offspring of workers exposed to dinoseb through drift of the spray, exposure on reentry to the fields after spraying, and exposure to residues on equipment or clothing.)

We note finally that Love misleads the Court in indicating that review was sought in district court as soon as reconsideration of the suspension order with regard to the crops involved in this case

the decision below constitutes "manifest error," is "implausible" and "failed to identify any coherent legislative purpose that could explain its construction." Brief for the Federal Respondent in Opposition ("Gov. Br.") at 13. Moreover, although it uses carefully-guarded and somewhat opaque language (some of which we set out in the margin), in the end the Government agrees as well with the certiorari petion's assertion that a result of the decision of the Ninth Circuit in this case will be, at a minimum, "to *inhibit* the [Environmental Protection] Agency from using its emergency powers" to remove pesticides from the market. Petition for a Writ of Certiorari ("Cert. Pet.") at 26 (emphasis supplied).[3]

The Government nonetheless opposes certiorari, giving as its primary justification that it is not *certain* that EPA will *always* be deterred in the future from issuing emergency orders where there are in fact health emer-

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was denied. First, EPA had not yet acted at all on the modification request with regard to several of the crops involved in this case at the time review was sought in district court. *See* Gov. Br. at 6 n.4. Second, the modification process under 40 C.F.R. Pt. 164, Subpt. D is a separate administrative proceeding; Love did not seek in district court to review EPA's handling of the limited modification request, but rather to overturn the original suspension order in its entirety. *See* Gov. Br. at 4, n.4; 6, n.4.

[3] The Government acknowledges, for example, that "this decision may be a factor in its deliberations when [EPA] weighs the advisability of emergency action in the future." Gov. Br. at 14. In particular, "the Agency may decide that a case presenting particularly difficult scientific issues is best adjudicated in a single administrative forum . . . rather than a multiplicity of district courts." And, "[t]he agency may also be concerned about its practical ability to administer and enforce an emergency order in a context in which interested parties are likely to use judicial review in order to prevent finality and create uncertainty." Gov. Br. at 14. Thus, it is possible that "the decision would sometimes have a chilling effect on the agency's willingness to issue an emergency order." Gov. Br. at 15; *see* Cert. Pet. at 26 (referring to "the chilling effect [of the decision] on the use of EPA's power to prevent an imminent health hazard.")

gencies; thus, future judicial review of the issue presented in this case will not be "automatically" precluded. Gov. Br. at 14.[4]

Put in plain English, that justification comes down to the proposition that a patently erroneous court of appeals' decision that may well deter the Government from protecting against public health emergencies as directed by Congress—where (a) there is no prospect of court intervention in any future case in which such deterrence does occur;[5] and (b) there is the possibility, although not the certainty, that the effect of this deterrence will be to eliminate *any* later opportunity for this Court to review the jurisdictional issue—is *not* a matter of sufficient importance to merit the exercise of this Court's *certiorari* jurisdiction.

Under some statutory schemes, a concern with preserving judicial resources where there is no certainty that a novel decision will have a uniform negative impact might be well taken. In this instance, however, *the issue is one that only arises if a government agency first determines that there is a danger to the public health so grave as to constitute an emergency.* In this context, the prospect that the public health could be endangered, in one or more future instances, *without any possibility of correction by the courts*, because of a "manifest error" by the court of appeals in this case fully justifies—and we submit urgently requires—this Court's review.

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[4] *See id.* (emphasis supplied) ("the effect of this decision will not *necessarily* be controlling"); *id.* at 15 (emphasis supplied) ("the effect [of the decision] will not be uniform or pervasive, nor will it operate *automatically* to foreclose future review.")

[5] The public is unlikely to be aware of the degree to which the result below was a factor in declining to issue an emergency order in a particular instance. Moreover, the statute does not in any event provide for review of a *refusal* to issue an emergency order. 7 U.S.C. § 136d(c)(4).

2. Since the *certiorari* petition was filed, an event has occurred which is so plainly relevant to our request for review that we feel duty-bound to advise the Court even though we are not certain of its legal ramifications: As we indicated in the petition, EPA has now issued a final cancellation of dinoseb, the pesticide involved in this case. Cert. Pet. at 9 n.7. In two cases concerning the validity of that final order which were pending in the Ninth Circuit at the time the petition was filed, that court, on March 20, 1989, days after oral argument, issued an order upholding the cancellation, with opinion to follow. *Northwest Food Processors Ass'n v. Reilly*, Nos. 88-4339, 88-4389 (9th Cir. Mar. 20, 1989). *See* Gov. Br. at 5 n.3. This case is not technically moot as a result of the Ninth Circuit's recent decision. *See* Gov. Br. at 5 n.3. It is quite likely, however, that the case will become moot within the next several months.[6]

While we are aware of no doctrine of prospective mootness, we do suggest that, under these circumstances, it might be appropriate for this Court to hold the petition for certiorari pending the termination of the litigation concerning the cancellation order. If, as appears likely, the result of that litigation is to render this case moot, this Court should then grant *certiorari* and vacate the

[6] The reason is that as of this moment, dinoseb has been finally cancelled by EPA. Since the suspension order here at issue was in effect only pending the cancellation order, the propriety of the suspension order, presents no live issue right now. Unless the Ninth Circuit, sitting en banc, overturns the March 20 decision of the Ninth Circuit panel, or this Court grants *certiorari* on the question of the propriety of the cancellation, the question whether the suspension order is proper will be moot. Given that the same district court that overturned the suspension order approved the final cancellation (Cert. Pet. at 10 n.7), and that the Ninth Circuit panel felt that the validity of the cancellation order was sufficiently clear that the panel could issue an order without opinion days after oral argument approving the cancellation order, it seems extremely unlikely that the challenges to the cancellation order will ultimately succeed.

decision below, remanding to the court of appeals with directions to dismiss the case on grounds of mootness. *United States v. Munsingwear Corp.*, 340 U.S. 36, 39-41 (1950); *Deakins v. Monaghan*, —— U.S. ——, ——, 108 S. Ct. 523 (1988); *see also, e.g., Chicago Board Options Exchange, Inc. v. Board of Trade of the City of Chicago*, 459 U.S. 1026 (1982). The result of that approach will be substantially to eliminate the decision below as a deterrent to any future EPA decisions with regard to emergency suspension orders, while precluding any need for this Court to decide on the merits the jurisdictional issue determined by the court of appeals.

CONCLUSION

For the reasons stated above and in the Petition for Writ of Certiorari, the petition should be granted.

Respectfully submitted,

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